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LINCOLN'S SUSPENSION OF HABEAS CORPUS AS VIEWED BY CONGRESS

BY

GEORGE CLARKE SELLERY

Assistant Professor of History in the University of Wisconsin

Published bi-monthly by authority of law with the approval of the Regents of the University and entered at the post office at Madison as second-class matter

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LINCOLN'S SUSPENSION OF HABEAS CORPUS.

INTRODUCTION.

The suspension of the privilege of the writ of habeas corpus by President Lincoln in 1861 gave rise to a considerable mass of pamphlets, periodical articles and more ephemeral writings,[1] and to a large number of legal decisions.[2] In these, considerations of law, history and expediency are marshalled in the main against but to some extent for the claim of the President to suspend under the Constitution. A careful working-over of this material led the writer to the conclusion that the Gordian knot[3] of habeas corpus suspension in the United States is extremely difficult if not impossible to untie. Further investigation led to the belief that a detailed historical exposition of the attitude of Congress toward Lincoln's suspension of the privilege of the writ would not only cast light upon the psychology of Congress in war-time, but might show that the knot was cut while the pamphleteers were still at work.

The only possible federal depositories of the power to suspend are Congress and the President. Until 1861 the view that Congress alone could suspend was generally accepted, or

[1] See list of pamphlets, etc., appended to S. G. Fisher's *The Suspension of Habeas Corpus during the War of the Rebellion,* in *Political Science Quarterly,* vol. III, pp. 485–488; Democratic State Platforms, 1861, 1862; *Congressional Globe,* 37th Congress, *passim.*

[2] See Law Digests *sub* Habeas Corpus.

[3] Cf. Lieber to Sumner, January 8, 1863: "Every one who maintains that it can be proved with absolute certainty that the framers of the Constitution meant that Congress alone should have the power [to suspend the privilege of the writ] . . . is in error . . . It cannot mathematically be proved from the Constitution itself, or from analogy which does not exist, or from the debates, or history." *Life and Letters of Francis Lieber,* ed. by Perry, 1882, pp. 328–329.

at least was nowhere controverted.[4] The President's action in 1861 was a practical denial of the correctness of this view. The stand which Congress took on this seeming encroachment upon its hitherto unquestioned jurisdiction manifestly merits careful examination. If Congress acquiesced in Presidential suspension, if, as this essay attempts to demonstrate, it conceded the President's right under the given circumstances to suspend, the historical precedent thus established must be given great weight. It is true that the conditions of the time were abnormal, and true that "acts committed in time of war, under the pressure of necessity and self-preservation, are not likely to ripen into precedents for times of peace."[5] But federal suspension of the privilege of the writ of habeas corpus cannot constitutionally occur in time of peace; it is a proceeding which, fortunately for the people of the United States, can be resorted to only in most abnormal times. The importance of the decision of Congress in 1861–1863 upon the question of the President's right to suspend is therefore not weakened by the conditions under which the decision was rendered.

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[4] "I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the Writ could not be suspended, except by act of Congress." Taney, C. J., in *ex parte* Merryman, Taney's *Circuit Court Decisions*, p. 255.

"The better opinion . . . among judges and lawyers and constitutional commentators, surely is that the writ of *habeas corpus* was never intended by the Constitution to be suspended except in pursuance of an act of Congress. The courts have so held, judges have so stated, commentators have so written, and not a commentator can be found, who has written on the Constitution before this rebellion, who ever disputed that proposition. There is great diversity of opinion in the country now." Trumbull, in the Senate, December 9, 1862. *Globe*, 3d. S. 37th Cong. p. 31.

[5] Lyman Tremain in N. Y. *Daily Tribune*, September 11, 1861.

CHAPTER I.

THE HABEAS CORPUS PROBLEM.

The exclusive right of Congress to suspend the privilege of the writ of habeas corpus[1] was challenged by President Lincoln at the outset of the Civil War. April 27, 1861, apprehensive for the safety of the isolated capital, the President issued an order authorizing General Winfield Scott to suspend the writ of habeas corpus. The order, which practically empowered General Scott to arrest and detain at will,[2] was as follows: "You are engaged in repressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally or through the officer in command at the point where resistance occurs, are authorized to suspend that writ."[3]

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[1] The customary phrasing is "suspend the writ of habeas corpus."

[2] It is still a disputed point in legal theory whether the suspension of the privilege of the writ authorizes arrests. The *obiter dictum* of the Supreme Court, in *ex parte* Milligan, that the suspension "does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty," was a flat denial of the correctness of the practice of the Civil War. Four minority justices, however, including Chief Justice Chase, upheld the legality of the practice. See 4 *Wallace,* pp. 115, 137. The President in his message of the extra session, July 4, 1861, said that he had authorized General Scott to suspend the privilege of the writ, or, as he explained, "to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety." *Works*, vol. II, p. 59. See also the President's letter to Erastus Corning and others, June 12, 1863. *Ibid.* p. 348. See also Seward to Lyons, October 14, 1861. 115 *War Records,* p. 633.

[3] 115 *War Records,* p. 19. The words, "on or in the vicinity of any military line" etc., were a euphemism for "anywhere in Maryland." See, for example, Latham's statement in the Senate, July 20, 1861. *Globe,* 1st S. 37th Cong. Appendix, p. 19.

Hard upon this order came the proclamation of May 10, 1861, in which the President authorized the United States commander on the Florida coast to suspend the writ, commanding him "to permit no person to exercise any office or authority upon the islands of Key West, Tortugas and Santa Rosa which may be inconsistent with the laws and the Constitution of the United States, authorizing him at the same time if he shall find it nesessary to suspend there the writ of *habeas corpus* and to remove from the vicinity of the United States fortresses all dangerous or suspected persons."[4]

These are the two authorizations of suspension which were the text for the habeas corpus debates in the first session of the thirty-seventh Congress. It is not necessary to refer specifically to any of the subsequent orders.[5] The practice which was almost straightway adopted was to dispense with any general order to suspend, and to make extraordinary arrests whenever and wherever necessary, the theory being that such arrests were *ipso facto* suspensions of the writ. Except at the very beginning of the war there was no hard and fast line to be determined by reference to this or that particular order of suspension beyond which the Government could not consistently, or would not, make summary arrests. No one, by virtue of residence in even the most peaceful portions of Union territory, was safe from executive apprehension.

The extra session of Congress began July 4, 1861, and July 5 the message of the President was read in both Houses.[6] In it he reviewed, among other matters, the measures he had taken to meet the crisis. The relevant portion of the message is as follows: "Recurring to the action of the Government, it may be stated that at first a call was made for seventy-five thousand militia; and rapidly following this a proclamation was issued for closing the ports of the insurrectionary districts by proceedings in the nature of a blockade. So far all was believed to be strictly legal. At this point the insurrectionists announced their purpose to enter upon the practise of privateering.

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[4] 115 *War Records*, p. 19.
[5] They may be found in the *War Records*.
[6] *Globe*, 1st S. 37th Cong. pp. 11, 13.

"Other calls were made for volunteers to serve for three years, unless sooner discharged, and also for large additions to the regular Army and Navy. These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then as now that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.

"Soon after the first call for militia, it was considered a duty to authorize the commanding general in proper cases, according to his discretion, to suspend the privilege of the writ of *habeas corpus*, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety. This authority has purposely been exercised but very sparingly. Nevertheless, the legality and propriety of what has been done under it are questioned, and the attention of the country has been called to the proposition that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them. Of course some consideration was given to the questions of power and propriety before this matter was acted upon.[7] The whole of the laws which were required to be faithfully executed were being resisted, and failing of execution in nearly one third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their

[7] The subject of habeas corpus suspension appears to have been first debated by President and Cabinet when the special session of the Maryland Legislature, called for April 26, was under consideration. It was believed that the Legislature would probably attempt some act of secession. The question was would it not be wise to prevent the meeting of the Legislature. The President decided, after Attorney-General Bates had submitted his legal notes and other Cabinet officers had given their advice, that it would be neither justifiable nor effective to take the proposed action against the Legislature, which had, he said, clearly a legal right to assemble. April 25, he gave his special directions to General Scott: "I therefore conclude that it is only left to the commanding general to watch and await their action, which, if it shall be to arm their people against the United States, he is to adopt the most prompt and efficient means to counteract, even if necessary to the bombardment of their cities, and, in the extremest necessity, the suspension of the writ of *habeas corpus*." *Works*, vol. II, p. 38; Nicolay and Hay, vol. IV, p. 167. No authority was exercised under this order. Such an attitude toward suspension must have seemed strange a few months later.

execution some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly: are all the laws *but one* to go unexecuted, and the Government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to prevent it? But it was not believed that this question was presented. It was not believed that any law was violated.[8] The provision of the Constitution that 'the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it,' is equivalent to a provision—is a provision—that such privilege may be suspended when, in case of rebellion or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now, it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.

"No more extended argument is now offered, as an opinion, at some length, will probably be presented by the Attorney General.[9] Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress."[10]

The habeas corpus issue was thus placed squarely before Congress by the President himself.

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[8] Note especially the original draft of this portion of the message in Nicolay and Hay, vol. IV, pp. 176-177.

[9] For this opinion, see 115 *War Records*, pp. 20 ff. The opinion is dated July 5; it was made public July 13, in response to a House resolution. *Globe*, 1st. S. 37th Cong. p. 117.

[10] *Works*, vol. II, pp. 59–60.

CHAPTER II.

THE INACTION OF THE EXTRA SESSION.

The President's message was read to the Houses on the afternoon of July 5 at two o'clock.[1] Its contents do not appear to have been made public before that time.[2] Nevertheless, a most important part of the work of the extra session had already been outlined to the Senate by Senator Henry Wilson of Massachusetts, who had been, in the session of March, 1861, chairman of the Committee on Military Affairs and the Militia—the leading committee in time of war. July 4, even before the Senate was fully organized or the standing committees were appointed, Wilson gave notice that he would the next day ask leave to introduce six bills, the titles of which he read. The first bill was entitled, "A bill to ratify and confirm certain acts of the President for the suppression of insurrection and rebellion." The others made provision for drawing out the military strength of the Union.[3] The Senate almost immediately adjourned.

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[1] *Globe,* 1st. S. 37th Cong. pp. 11, 13; N. Y. *Daily Tribune,* July 6.

[2] "The President's Message suffers sadly in style and diction from being transmitted to us by telegraph. Some of the more obvious blunders we have been able to correct. . . Had private copies of the Message been dispatched by mail or express on the evening of the 4th to the President's most trusted agent or friend in each of the great cities, with instructions to deliver them to each daily newspaper only upon notice by telegraph that the reading in Congress had been commenced, his most important document would have appeared in the regular evening editions of yesterday's journals. . . " Editorial note in N. Y. *Daily Tribune* of July 6, 1861. See also N. Y. *Herald* and N. Y. *Times* of same date.

[3] The titles of these five bills were: "A bill to authorize the employment of volunteers to aid in enforcing the laws and protecting public property; A bill to increase the present military establishment of the United States; A bill providing for the better organization of the military establishment; A bill to promote the efficiency of the Army; and A bill for the organization of a volunteer militia force, to be called the National Guard of the United States." *Globe,* 1st. S. 37th Cong. p. 2.

The text of all six bills seems to have been available July 4.[4] "Bill No. 1" was substantially in the following words:

"A Bill to Ratify and Confirm certain acts of the President for the Suppression of Insurrection and Rebellion.

"Whereas, since the adjournment of the last Congress, large combinations of men assuming to act in the name and on behalf of some of the States of the Union, have openly set at defiance the authority and laws of the United States, and have arrayed themselves in hostility against the Government, threatening its overthrow; and whereas, under these exigencies and for the purpose of resisting such combinations and suppressing such insurrection and rebellion and causing the laws of the United States to be executed and preserving the Government, the President has called forth the militia of several states, and large numbers of such militia, in obedience to such call, are now in the service of the United States; therefore

"Be it enacted . . . That all the acts and proceedings of the President in calling into the service of the United States the militia of the several States for the purpose aforesaid, and all acts and proceedings incident thereto; and all acts and proceedings relating to the operations of the military and naval forces of the United States, are hereby approved and confirmed, and the same shall be legal and valid, in all respects as if done under the express authority of Congress previously conferred.

"Sec. 2. And be it further enacted, that in case at any time hereafter, during the recess of Congress, similar exigencies shall arise, by reason of any combination to resist the execution of the laws or to destroy the government of the United States, the President shall have authority to call into the service of the United States such military and naval forces as

[4] The Washington correspondent of the New York *Herald*, in his letter of July 4, which was published in the issue of July 6—no paper being published July 5—gave all six *in extenso*. A comparison of his texts, so published, with those considerable portions of the bills which appear in the *Congressional Globe*, during the course of the debates upon them, proves the substantial accuracy of the *Herald* correspondent on this occasion.

he may deem necessary to suppress insurrection and rebellion and enforce obedience to the laws of the United States."[5]

July 5 passed without any sign from Senator Wilson. It was the day on which the President's message was read. The following morning he introduced his six bills. The first bill, however, had in the interval become a joint resolution (S. No. 1). The six measures were read twice by title and ordered to be printed."[6] The joint resolution was in the following words:

"Joint resolution (S. No. 1) to approve and confirm certain acts of the President of the United States, for suppressing insurrection and rebellion.[7]

"Whereas, since the adjournment of Congress, on the 4th day of March last, a formidable insurrection in certain States of this Union has arrayed itself in armed hostility to the government of the United States, constitutionally administered; and whereas the President of the United States did, under the extraordinary exigencies thus presented, exercise certain powers and adopt certain measures for the preservation of this Government—that is to say: First, He did, on the 15th day of April last, issue his proclamation calling upon the several States for seventy-five thousand men to suppress such insurrectionary combinations, and to cause the laws to be faithfully executed. Secondly. He did, on the 19th day of April last, issue a proclamation setting on foot a blockade of the ports within the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas. Thirdly. He did, on the 27th day of April last, issue a proclamation establishing a blockade of the ports within the States of Virginia and North Carolina. Fourthly, He did, by order of the 27th day of April last, addressed to the Commanding General of the Army of the United States, authorize that officer to suspend the writ of *habeas corpus* at any point on or in the vicinity of any military line between the city of Philadelphia and the city of Washington. Fifthly. He did, on the 3d day of May last, issue a proclamation calling into the service of the United States forty-two thousand and thirty-four volunteers, increas-

[5] N. Y. *Herald*, July 6, 1861. See also Philadelphia *Enquirer*, July 8, 1861. See also preceding footnote.

[6] *Globe*, 1st S. 37th Cong. p. 16.

[7] *Ibid.*

ing the regular Army by the addition of twenty-two thousand seven hundred and fourteen men, and the Navy by an addition of eighteen thousand seamen. Sixthly. He did, on the 10th day of May last, issue a proclamation authorizing the commander of the forces of the United States on the coast of Florida to suspend the writ of *habeas corpus*, if necessary. All of which proclamations and orders have been submitted to this Congress. Now, therefore,

"*Be it resolved* . . . That all of the extraordinary acts, proclamations, and orders, hereinbefore mentioned, be, and the same are hereby, approved and declared to be in all respects legal and valid, to the same intent, and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."[8]

The six measures were the same day ordered to be printed, and after the standing committees were appointed they were referred, on Wilson's motion, to the Committee on Military Affairs and the Militia, of which he had been re-appointed chairman.[9] July 8, Monday, at the very brief open session, Wilson, for the committee, reported the joint resolution without amendment and recommended its passage. He asked for its present consideration but Polk's objection, under the rules, made that impossible.[10]

The joint resolution was the response proposed by Wilson to that portion of the President's message, above quoted, in which he submitted certain specified measures to the better judgment of Congress. The message, or the information contained in the message, caused Wilson unobtrusively to transform his "Bill No. 1" into the joint resolution.[11] He did not

[8] *Globe*, 1st S. 37th Cong. p. 40.

[9] *Ibid.* pp. 17, 21. The members of the Committee were Wilson, chairman, King, Baker, Lane of Indiana and Lane of Kansas, Republicans, and Rice and Latham, War Democrats. *Ibid.*, p. 17; *Tribune Almanac*, 1861, 1862. For Rice's profession of faith see *Globe*, 1st S. 37th Cong. p. 242; and for his identification of his position with that of Latham, *ibid.* p. 217.

[10] *Ibid.* p. 21.

[11] These conclusions rest upon this foundation: The message was not made public until July 5; there is a close correspondence—amounting to practical identity—between the recital of the extraordinary measures in the message and in the joint resolution; above all, the resolution says: "All of which proclamations and orders have been submitted to this Congress."

withdraw the "bill;" he did not ask leave to introduce the resolution; he obtained leave to introduce the "bill" and introduced the resolution "in pursuance of previous notice."[12]

The most striking change in the resolution is the inclusion of the suspensions of the privilege of the writ of habeas corpus among the extraordinary measures. The absence of these from the "bill" may mean that Wilson did not believe that the President transcended his constitutional powers in suspending the habeas corpus or that Wilson did not consider it within his province, as prospective chairman of the Committee on Military Affairs and the Militia, to include them in a military bill. If the latter is the correct conclusion, then the President's message would seem to have caused Wilson to change his opinion.

A comparison of the enacting clause of the "bill" with the corresponding clause of the resolution reveals another important alteration. The language of the "bill"—"*Be it enacted* . . . That all the acts and proceedings of the President . . . are hereby approved and confirmed, and the same shall be legal and valid, in all respects as if done under the express authority of Congress previously conferred"—is clear. Manifestly this means the *legalization* of that which might otherwise be held to lack a degree of legality. The words of the resolution—"*Be it resolved* . . . That all the extraordinary acts, proclamations and orders, hereinbefore mentioned, be and the same are hereby, approved and declared to be in all respects legal and valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority and direction of the Congress of the United States"—are not clear but equivocal. If the resolution had ended with the word valid, it would have been a declaration of the President's constitutional right to do what he had done; what follows the word valid makes the whole statement obscure and suggests that the resolution was meant to legalize the illegal. It would obviate a dilemma if the resolution might be considered as declaratory of the legality

[12] There is no hint in any of the debates that the resolution was a changeling.

of extraordinary acts one, two and three, and as intended to legalize acts four, five and six. But this is not possible; the section commencing "Be it resolved" must be construed as a whole, one way or the other.

The obscurity of this portion of the resolution was fully revealed in the debates upon it. Of the senators who expressed themselves clearly on the question, four were of the opinion that it was a declaration of legality. John Sherman's statement may be given as typical: "I approve the action of the President. I believe the President did right. He did precisely what I would have done if I had been in his place—no more, no less . . . but I cannot here, in my place, under oath, declare that it was strictly legal, and in consonance with the provisions of the Constitution. I shall therefore be compelled to vote against the resolution."[13]

Twelve of the senators, including Wilson, expressed the view that the clause meant legalization of the acts of the President. Howe stated the view explicitly when he said: "The resolution does not affirm that they were legal; that they were sanctioned by the legislative power of the United States; but it declares that they shall be[14] as legal and valid as if they had had the previous express authority and direction of the Congress of the United States.

"I want to say further, Mr. President, that there may be no sort of mistake about the position I occupy, that my admiration of them is proportioned exactly, mathematically, to the extent that they were violations of the existing law."[15] Wilson, in discussing the resolution, which he said was "plain and simple to the comprehension of every man," asked that "the vote shall be taken on merely legalizing the action of the past."[16]

The ambiguity of the final clause of the resolution is es-

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[13] *Globe*, 1st S. 37th Cong. p. 393. The three others were Bayard (*ibid.* Appendix, p. 14), Carlile (*ibid.* p. 339) and Lane of Indiana (*ibid.* pp. 142-143).

[14] The resolution does not say "shall be."

[15] *Globe*, 1st S. 37th Cong. p. 393.

[16] *Ibid.* pp. 41, 42. The ten other senators who held this interpretation were: Breckenridge (*ibid.* p. 142.), Clark (*ibid.* p. 41), Fessenden (*ibid* p. 46), Hale (*ibid.* p. 41), King (*ibid.* p. 46), Morrill (*ibid.* p. 392), Pearce (*ibid.* p. 335), Polk (*ibid.* p. 47), Powell (*ibid.* p. 68) and Trumbull (*ibid.* p. 392). In

tablished out of the mouths of United States senators.[17] It is difficult to avoid connecting the ambiguity with the presence in the joint resolution of the sections reciting the President's suspension of the habeas corpus. The ambiguity and the suspension entered the resolution together; they may be said to have left it together. For when, toward the close of the extra session, the fate of the resolution was sealed and Wilson re-introduced his old "Bill No. 1" in a new form, its enacting clause was again unequivocal. As has been shown, the ambiguity served in a way to support or leave standing the President's claim constitutionally to suspend the privilege of the writ of habeas corpus. In view of subsequent cases of a similar nature, it is difficult to avoid the suspicion that the ambiguity was designed for this very purpose.

The prospects of the joint resolution were good. It was the first measure presented to the Senate. It was given precedence over the five military bills which were the basis of the work of the Senate for the session. It was introduced by the leading Republican, the chairman of the leading committee. It was reported favorably by this committee, July 8, without amendment and with only one mildly dissenting voice.[18] July 10—the earliest possible day[19]—the resolution came before the Senate as the first business on the calendar. The speeches of that day showed a determination on the part of Wilson and his supporters to hurry the resolution through.

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most cases several references might be given, but these are the clearest. Trumbull wavered somewhat in expressing himself on the point, but the context, p. 392, justifies his inclusion here.

Eight senators construed the resolution as a declaration of commendation—waiving, to all intents, the question whether it was meant to legalize or assert legality. These were: Browning (*ibid.* p. 188), Johnson (*ibid.* pp. 289–290), Kennedy (*ibid.* p. 42). Latham (*ibid.* Appendix. p. 19), McDougall (*ibid.* p. 340), Saulsbury (*ibid.* p. 442) and Thomson (*ibid.* p. 395).

[17] August 6, 1861, the last day of the session, when the resolution had no chance of passing, and when it was no longer possible to amend it, Wilson offered to change the last clause to read, "Be, and the same are hereby, approved, and in all respects legalized and made valid," adding significantly, "I believe this expresses the idea more fully and more completely. *Globe*, 1st S. 37th Cong. p. 452 and *passim*.

[18] Latham's. *Ibid.* p. 41.

[19] The resolution had to lie over from July 8 to July 9, under the rules. July 9 was devoted to eulogies of the late Senator Douglas.

Despatch breathes through their words as reported in the Globe, and the imminence of the passage of the resolution was recognized on all sides.[20] The resolution was amended by the addition of the words, "provided that nothing herein contained shall be construed as authorizing a permanent increase of the Army or Navy," Latham's motion to strike out the sections relating to habeas corpus was rejected, and the resolution was read a third time and placed upon its passage.[21] At this point Polk intervened with a demand for the yeas and nays, and these granted, he made a speech against the resolution.[22] After talking at considerable length he expressed a wish to conclude his speech the following day, and in this was supported by Powell, but the Senate refused to adjourn. Polk therefore resumed the floor, whereupon Wilson, after consultation with one or two senators, announced his will: "I propose to let this resolution go over until to-morrow morning, with the understanding that we shall now take up the volunteer bill." This proposition was at once agreed to.[23]

July 11 the resolution almost monopolized the attention of the Senate. Polk concluded his speech, at length, and Powell continued in the same strain, at greater length.[24] When the latter had ended Breckinridge and Bayard indicated their intention to continue the debate for the opposition, and again Wilson gave the word, with apparently increasing willingness: "I propose, if the Senators desire to speak on this question—and I suppose they do—to let the pending resolu-

[20] Kennedy, Unionist, opened his remarks by saying: "Mr. President, I desire to say one word before the vote is taken on this extraordinary measure." *Globe*, 1st S. 37th Cong. p. 42. King, Republican, said, apropos of an amendment: "I offered this proposition without any intention to delay the Senate five minutes . . . However I will not continue this debate so as to protract the time; I prefer voting." *Ibid.* pp. 42–43. Wilson, in opposing Polk's request for one day's postponement, remarked: "I hope, therefore, that the Senator will not ask us to lay this resolution aside at this time, and I hope that the Senate will continue the consideration of it until it is ready to vote upon it." *Ibid.* p. 41. And see other similar expressions, *ibid.* pp. 41–43. Lord Lyons, the British ambassador, wrote Lord Russell, July 14: "It is thought that the Resolution will pass both Houses without any material alteration." *North America No. 1* [British Blue Book], presented to Parliament 1862, p. 57.

[21] *Globe*, 1st S. 37th Cong. p. 47.

[22] *Ibid.* pp. 47–49.

[23] *Ibid.* pp. 49–50.

[24] *Globe*, 1st S. 37th Cong. p. 71.

tion go over until to-morrow, and we can go on to-day with another bill containing practical measures." The Senate agreed.[25]

July 12 passed without a reference to the resolution. July 13 no word was spoken concerning it. July 15, Monday, it was Breckinridge, the leading Democrat, and not Wilson, the Republican, who broke the silence with a request to have the resolution taken up and made the special order for the next day.[26] Thereafter the discussion of the resolution continued, but in a desultory fashion, long speeches being made from time to time, without haste or compression.[27] It was obvious that the Republicans were, by this time, in no hurry to pass the resolution.

July 17, 1861, Trumbull furnished fresh fuel for the debate by introducing a bill authorizing the suspension of the habeas corpus. Some such measure he regarded as a necessary complement to the resolution. "I am not disposed," he said, a few days later, "to say that the Administration has unlimited power and can do what it pleases after Congress meets. I am willing to excuse it . . . and to sustain it . . . but if you propose to pass a resolution approving the exercise of powers for which you may be unable to find in strict law the warrant and then refuse to grant by law the authority to do what is necessary to be done, it seems to me it will be a very strange proceeding. I think we had better let this resolution lie until we dispose of the bill. . . . "[28]

Trumbull's bill was referred to the Judiciary Committee, of which he was chairman, and was ordered to be printed.[29] July 26 the committee reported it with an amendment in the

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[25] *Globe*, 1st S. 37th Cong. p. 71.

[26] *Ibid.* p. 127.

[27] Johnson, Tennessee, got successive postponements from July 20 to July 27, and during the interval the debate was at a standstill. *Ibid.* pp. 217, 220, 237, 276. July 26 he said: "If the Senate is anxious to have action upon it [the resolution] at once, I have no objection to their taking a vote upon it now, and what little I have to say I can say upon some other proposition." The *Globe* at this point reads: "Several Senators. We have no objection to its going over." *Ibid.* p. 276.

[28] *Ibid.* p. 392.

[29] *Ibid.* p. 167.

form of a substitute bill (S. No. 33).[30] This bill authorized the Commanding General and the commanders of military departments and districts "within their several commands and within States, Territories or districts of country which may have been, or shall hereafter be declared by the President of the United States to be in a state of insurrection, or in actual rebellion" to declare by proclamation such territory or any part thereof "in a state of insurrection and war." Section 4 suspended the operation of the writ of habeas corpus within such territory: "That from and after the publication of the proclamation heretofore mentioned, the operation of the writ of *habeas corpus* shall be so far suspended that no military officer shall be compelled to return the body of any person or persons detained by him by military authority; but upon the certificate, under oath, by the officer having charge of any one so detained, that such person is detained by him as a prisoner under military authority, further proceedings, under the writ of *habeas corpus*, shall be dismissed by the judge or court having issued the said writ." Section 8 empowered the military commander over such territory to administer a specified oath of allegiance to persons suspected of disloyalty. Refusal to take such oath should involve the detention of the suspected persons as prisoners "until the restoration of quiet and peace in the locality where such arrests" had been made, and anyone taking the oath who should afterwards be found in arms against the Government or aiding and abetting its enemies should be liable to the punishment of death at the hands of a court-martial. Section 10 directed the Commanding General or departmental or district commander to recall, publicly, the declaration of the state of insurrection and war, whenever the necessity therefor had ceased. The other sections made provision for the government of such territory and for the conduct of the army therein.[31]

This bill was manifestly of much potential import. It would apply to troubled Union territory, and to territory recon-

[30] *Globe*, 1st. S. 37th Cong., p. 275.

[31] "A bill to suppress insurrection and sedition and for other purposes." *Ibid.* pp. 336–337.

quered from the Confederates. It was the latter aspect of the measure which secured most attention and most favor for the bill in the Senate.[32] But it was also recognized that the bill would be applicable to sections of the Union untouched by war. Breckinridge, whose zeal in opposition was marked, declared it a bill "which abolishes, in the discretion of the Executive and of his military subordinates, not only the right to the writ of *habeas corpus* and the right of trial by jury before civil tribunals for crimes committed by citizens, but it absolutely abolishes, at his discretion, all State governments, all the judicial, executive, and legislative functions of State governments, and authorizes subordinate military commanders to substitute rules and regulations at their will for the laws of the different Commonwealths of this Union, and practically would operate as hardly upon the non-seceded as upon the seceded States."[33] Trumbull, in immediate reply, said: "The Senator from Kentucky thinks that this bill allows the military authorities great power to arrest men. Are they not arrested now? Are not men arrested in the city of Baltimore and already in confinement? . . . Are they not arrested in my State?"[34]

The bill, coming up for discussion for the first time July 30, had little chance in the Senate. It was imperfect. Trumbull admitted the fact, although he asserted that it was the duty of the Senate to perfect the bill, inasmuch as the Legislature should enable the military authorities to do lawfully that which was needful to the suppression of the rebellion.[35] Others said that the bill was too important to be rushed through hurriedly.[36] The members of the Judiciary Committee were of every shade of opinion,[37] as were the senators as a whole. On a test vote, taken August 2, Bill No. 33 had to

[32] *Globe,* 1st S. 37th Cong. pp. 337–393, especially 372, 373.
[33] *Ibid.* p. 372.
[34] *Ibid.* p. 373.
[35] *Ibid.*
[36] Harris, for example. He summed up by alleging that the temper of the Senate and the temperature of the weather were against it. *Ibid.* p. 372.
[37] The members were Trumbull, Foster, Ten Eyck, Cowan, Harris, Bayard, and Powell. *Senate Journal,* 1st S. 37th Cong. p. 21.

give way to the joint resolution, 28 votes to 11. It was obvious that the bill was disposed of for the session.[38]

It was soon made manifest that the victory of the joint resolution was an empty one, and that its chance of success was also gone. Immediately after the defeat of the bill Doolittle moved to refer the resolution to the Judiciary Committee.[39] The Democrats, who had for days been exhibiting marked solicitude for the welfare of the resolution, recognized the significance of Doolittle's motion and Breckinridge taunted the Republicans with wishing to consign the resolution to the dungeons of a committee room.[40] The Senate rejected Doolittle's motion by a vote of 23 to 17. Analysis of the vote shows that it was the Democrats who kept the resolution before the Senate.[41] They had divined the divided counsels of the majority. The resolution was debated further the same day but was presently pushed aside for other business and finally on Wilson's motion the Senate went into executive session.[42]

Monday, August 5.[43] Wilson introduced a bill to legalize a portion of the measures enumerated in the joint resolution. This is obviously the first part of "Bill No. 1" in a new garb. The bill was as follows: *"Be it enacted, &c.*, That all the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the Army and Navy of the United States, and calling out, or relating to the militia or volunteers from the States, are hereby approved, and in all respects legalized and made valid, to the same intent and with the same effect as if they had been [issued and] done under the previous express authority and direction of

[38] *Globe*, 1st S. 37th Cong. p. 393. The yeas and nays show that not one Democrat and that only two members of the Judiciary Committee, stood by Trumbull on this vote. *Ibid.*

[39] *Ibid.*

[40] For this and other jibes, see *ibid.* pp. 392, 393, 452.

[41] Only two of the 17 were Democrats and these were War Democrats; eight of the 23 were out-and-out Democrats, one was a War Democrat and two were Unionists. *Ibid.* p. 393.

[42] *Ibid.* p. 406.

[43] No mention of the joint resolution, August 3.

the Congress of the United States."[44] Considerations of Senate procedure made it advisable to tack this measure to a bill increasing the pay of the troops, and the amended bill passed the Senate by a vote of 37 to 5.[45] In the House, a motion to strike out this amendment failed by a vote of 19 to 74.[46] The bill (S. No. 72) approved by the President, August 6, contains this legalizing section in the words in which it was presented by Wilson.[47]

The legalizing section was framed, it was said, to meet the technical objections of three-year volunteers who saw a loophole of escape from the army in the circumstance that the President had exceeded his authority in calling them into the service of the United States.[48] But it will be seen that the phraseology of the section was such that it might be used to cover more than the special difficulty. It could and did serve as the basis for general assertions that Congress approved the extraordinary acts of the President. "Both Houses," said the New York *Daily Tribune* of August 6, "yesterday passed resolves formally approving the acts of the President for the salvation of the Republic. Good." In a similar vein Senator Grimes wrote to an Iowa correspondent who was alive to the importance of the point as a campaign issue: "This section ratifies and confirms, to the fullest possible extent, all the acts of the President that needed or that were susceptible of ratification. . . . So far as I am informed, I believe it was all the confirmation of the acts of the President that he either expected or desired."[49]

The passage of this legalizing amendment was on the face of things an act of salvage upon the wrecked joint resolu-

[44] *Globe*, 1st S. 37th Cong. p. 442.

[45] *Ibid.* pp. 442–443.

[46] *Ibid.* p. 449.

[47] See section 3 of Chapter LXIII of the Acts of the 37th Congress. The amended bill (S. No. 69) after passing both Houses was laid upon the Senate's table and a new bill (S. No. 72) was substituted, amended and passed in both Houses and finally received the President's signature.

[48] See Fessenden's explanation, *Globe*, 1st S. 37th Cong. p. 442.

[49] Salter's *Grimes*, pp. 150–152. Letter referred to in Rhodes, vol. III, p. 439.

tion.[50] Nevertheless Wilson announced shortly after the opening of the Senate, August 6, that he proposed to take up the joint resolution and wanted it brought to a vote.[51] Whatever his motives, whatever his expectations of success, he did, on the last day of the session, make a gallant effort to get a final vote upon it. He offered to remove all ambiguity from the enacting clause;[52] he offered to modify the section on the blockades. It was all in vain. The effort served merely to enable leading Republicans to exhibit a belated and suspicious enthusiasm for a measure which had no chance of passing at the eleventh hour, to show the confidence of the Democrats that the Republicans would not allow it to come to a vote, and to give each party an opportunity to throw upon the other the responsibility for its failure.[53] There was a touch of poetic vengeance in the final supersession of the resolution, for it was Trumbull, the virtual author of Bill No. 33, who stood in the way—however needlessly—at the very end, and refused to allow the resolution to come to a vote.[54]

The responsibility for the failure of the resolution to pass the Senate must be laid at the door of the Republican majority. If they had continued of the same mind they were July 10, the ambiguity of the enacting clause would not have been a stumbling block.[55] The ambiguity was pointed out

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[50] Sherman said, August 5: "I am very glad this proposition has come up in this way, and I take it as a matter of course, that if this bill is passed, the other joint resolution will not be called up." *Globe,* 1st S. 37th Cong. p. 442. See also Saulsbury's statement, *ibid.* Certainly, if the joint resolution meant *legalization* and were to become law, this legalizing amendment would be supererogatory.

[51] *Ibid.* p. 451. And see his response to Breckinridge's jibe, *ibid.* p. 442.

[52] See above, p. 229, footnote.

[53] *Globe,* 1st S. 37th Cong. pp. 451–453.

[54] *Ibid.* p. 453.

[55] The ambiguity of the enacting clause served as a good excuse for senators who felt it necessary, at a later time, to justify the failure of the resolution. Senator Grimes wrote, in his letter of September 16, 1861: "There may be some who honestly believe that the Senate refused to support the President because of their failure to pass certain resolutions presented by Mr. Wilson, of Massachusetts. The facts in regard to those resolutions were these: They were introduced at an early day in the session, and were put aside from day to day to make room for what was considered more important business, until just at the close of the session, when they had reached that stage in parliamentary proceedings when it was impossible to amend them without parliamentary consent, and that could not be obtained. The objection urged by some gentlemen against them as they stood without amendment was, that they were

at an early day, and yet no motion to remove it was ever made in the Senate until the last day of the session, when the rules of the Senate required unanimous consent. That of itself, considering that the resolution was in the control of the majority for weeks, demonstrates almost conclusively that the Republicans in the Senate had lost interest either in legalizing, or recognizing the legality of, the President's suspension of the habeas corpus.

The change of attitude toward the resolution on the part of the supporters of the Administration took place immediately after July 10. It came so swiftly that it is difficult to escape the impression that the *volte face* was due to sudden and powerful pressure. In the absence of any direct evidence of the employment of this pressure it is safe to fall back upon the general and obvious conclusion that the Republican senators and their allies while as a whole approving of the suspension by the President were unwilling to place themselves

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improperly drawn . . . and declared that the acts of the President *were* legal and valid when performed, whereas as they insisted, they ought to have declared that those acts *should be* legal and valid as though done under the sanction of law.

"It was simply on account of this objection in the minds of a few Senators that the resolutions which it was impossible to amend were dropped, and the substance of them incorporated into a law . . ." Salter's *Grimes*, pp. 150–152.

John Sherman, in a letter to the Cincinnati Gazette, printed in the New York *Daily Tribune* of August 23, 1861, elaborated the same idea. "It is true I did not vote for Senator Wilson's resolution. No vote by yeas and nays was taken upon it. I would have voted against it, and I am well satisfied a majority of the Republican Senators would have voted likewise. But it was not for the reason you state. All the Republican and several of the Democratic Senators cordially approved and justified the acts of the President in Baltimore, and so declared and voted.

"Senator Wilson's resolution declared that the President's orders increasing the regular army and suspending the writ of *habeas corpus* were legal and valid; in other words, were among the powers delegated to the President by the Constitution . . . The legal power to suspend the writ of *habeas corpus* has been recently claimed for the President. . . . While I approved and justified the acts of the President, I could not say with Senator Wilson that they were strictly legal or within the delegated powers. There are times when our Executive officer must anticipate the action of Congress, but in such a case he assumes the hazard of a 'Bill of Impeachment,' or a 'Bill of Indemnity.' The President merely assumed this hazard, and in the vacancy of Congress wisely assumed a power not delegated to him by the Constitution. He places his own justification in his message on the ground of public necessity, and on this ground his acts have been approved, justified and legalized by Congress." Note again the use made of section 3 of chapter LXIII.

formally upon record as authorizing it or as declaring its legality. The former course might have embarrassed the Executive;[56] the latter, themselves.[57]

It would indeed be worth while to determine just why Congress, in the extra session, took no action on the habeas corpus question. The important thing, however, is established—that it took no action. The President had suspended the privilege of the writ on his own authority; he had asserted his constitutional right, under the given circumstances, so to do; he had, nevertheless, in deference to the older interpretation of the habeas corpus clause of the Constitution, submitted the question of the expediency of congressional action to the "better judgment of Congress." Congress, at the ideal time for asserting its rights, refrained from interfering and left the President's claim unchallenged. Another question suggests itself: How long must Congress acquiesce in order to perfect the President's title to suspend?[58]

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[56] The Grimes letter puts it in this way: "It must be apparent, I think, to everyone who will reflect upon the subject, that to have attempted such confirmation [i. e., to have passed the resolution] would be to inferentially admit that, as commander-in-chief of the Army and Navy of the United States, the President had no power to suspend the operation of that writ without congressional authority. Very few, if any, loyal members of Congress were willing to admit that. They did not doubt but that he had complete power in the premises, and they chose to leave him to exercise his authority under the constitution according to his own judgment. *Loc. cit.* Cf. the equally emphatic opposite view of Sherman, above, p. 237, footnote.

[57] Breckinridge, for example, said, August 2: "My deliberate judgment is, that in some mode the Senate will avoid putting itself on record in favor of the principles contained in this resolution. . ." *Globe*, 1st S. 37th Cong. p. 392. Doolittle denied any intention "to recoil from the responsibility of approving the acts of the Administration." *Ibid*, p. 452.

[58] Lord John Russell, an acute observer, was interrogated in the House of Lords, February 10, 1862, on the subject of the political arrests in the United States. In his interesting reply, he said, *inter alia*: "The question itself was brought before Congress and a resolution was proposed that there should be no arbitrary arrests except with the sanction of Congress. But it was contended that it was part of the prerogative of the President, and a large majority decided that the question should not be discussed and thereby left the President to act for himself." See the whole extract from the proceedings of the British Parliament, 115 *War Records*, pp. 213–216.

CHAPTER III.

THE INACTION OF THE SECOND SESSION.

The unwillingness displayed by Congress in the extra session to take positive action on the vexed problem of habeas corpus continued throughout the ensuing long session. There was not more than a tithe of the interest shown in the summer of 1861, and the only bill which saw the light under auspices at all favorable was kept back from consideration of either House until July 7, 1862, when the end of the session was in plain view.[1]

This bill (House No. 362) was framed by the House Committee on the Judiciary. March 13, 1862, Mr. May, for the committee, reported "a bill to provide for the discharge of

[1]The *habeas corpus* material of the session, outside of the bill in question, is slight. In the House Pendleton offered a resolution, December 10, declaring that Congress alone has power to suspend. It was laid on the table, 108 to 26. *Globe*, 2d S. 37th Cong. pp. 40–45. Vallandigham, December 23, introduced a personal liberty bill, to imprison the President for two years should he make any more arbitrary arrests. It was referred to the Judiciary Committee and slept the long sleep. *Ibid.* pp. 167, 2070. In the Senate Trumbull offered a resolution, December 12, asking the Secretary of State to report, *inter alia*, under what law he made arrests in loyal States. The resolution was referred, against Trumbull's will, to the Judiciary Committee. *Ibid.* pp. 60, 90–98. Senator King's resolution of December 23 favoring the prosecution of State prisoners in the courts went without debate to the same committee. *Ibid.* pp. 161, 175. Powell's resolution of April 21, 1862, asking detailed information concerning Kentucky arrests met considerable opposition, but after its language had been made very respectful it was allowed to go through. *Ibid.* pp. 1732, 2113, 2393 and *passim*. January 21, 1862, Bill No. 33 of the extra session was taken up and recommitted to the Judiciary Committee. *Ibid.* pp. 115, 409. May 5 Carlile introduced a bill to regulate arbitrary arrests. It went promptly to the same committee. *Ibid.* p. 1935. July 12 the Judiciary Committee reported back the King and Trumbull resolutions and was discharged. *Ibid.* p. 3271. July 11 and 12 it reported back Bill No. 33 and Carlile's bill and recommended their indefinite postponement. *Ibid.* pp. 3245, 3271. (On the latter date the committee reported back House Bill No. 362 favorably.) Shellabarger's long speech of May 12, in House Committee of the Whole, defending suspension by the President, completes the catalogue. *Ibid.* pp. 2069–2074.

State prisoners and others, and to authorize judges of the United States courts to take bail or recognizances to secure the trial of the same; which was read a first and second time, recommitted to the Committee on the Judiciary, and ordered to be printed.[2] July 7, 1862, the committee, through Bingham, reported with amendments the bill it had originally reported almost three months before.[3] The first section of the amended bill provided for the discharge on terms, by the federal courts, of political prisoners who should not have been indicted or presented by a grand jury attending said courts; the second section required the courts to discharge upon bail or recognizance political prisoners who should have been indicted or presented as aforesaid, provided that the laws entitled them to liberation on bail or recognizance. The third section of the amended bill was new;[4] the original bill contained no such provision. It was as follows:

"SEC. 3. *And be it further enacted,* That it is, and shall be lawful for the President of the United States, whenever, in his judgment by reason of 'rebellion or invasion the public safety may require it,' to suspend, by proclamation, the privilege of the writ of *habeas corpus* throughout the United States or in any part thereof, and whenever the said writ shall be suspended as aforesaid, it shall be unlawful for any of the judges of the several courts of the United States, or of any State, to allow said writ, anything in this or any other act to the contrary notwithstanding."[5]

Once again there is to be noted the curious ambiguity. This time it was the deliberate work of the House Judiciary Committee. What is the meaning of "is and shall be lawful?" Does the section declare that the President has the right or does it give him the right to suspend? Bingham, who was surely in a position to know, said it was "very easy of comprehension." "I ask," he continued, "the gentleman to consider that the amendment is in the very words of the Constitution itself."[6] That, however, was hardly a guarantee of

[2] *Globe,* 2d S. 37th Cong., p. 1228.
[3] *Ibid.* p. 3105.
[4] See Bingham's statement. *Ibid,* p. 3106.
[5] For whole bill see *ibid.* pp. 3105–3106, and below, pp. 268–270.
[6] *Ibid.* p. 3106.

clarity. July 8 Biddle attacked the problem of interpretation by intimating that he desired the section amended so as to read, "That it may and shall be lawful for the President of the United States whenever, in his judgment, by reason of rebellion or invasion the public safety may require it, to suspend by proclamation, for the period of twelve months, or until the next meeting of Congress, the privilege of the writ of *habeas corpus* in any of the United States, or in any part thereof, wherein the laws of the United States are by force opposed, and the execution thereof obstructed."[7] Bingham's response was still evasive: "The gentleman strangely misconceives this bill if he supposes there is anything in this legislation which puts it out of the power of the Congress of the United States, within twelve months after such proclamation may be made, to put an end to the law itself. The bill, as it now stands, impliedly and expressly upon its face, is a declaration that this whole matter, in so far as it can be effected by legislation, is in the power of the Representatives of the people. . . . "[8] Biddle had finally to out with it. "Up to the present time there has been a pretension made in behalf of executive power that the President alone has the right arbitrarily to imprison any American citizen. . . this bill itself, I am happy to see, denies that right."[9] Bingham allowed this assertion to pass unchallenged, but the question of interpretation would not down. In a few minutes Colfax said: "If by voting for this bill we imply that the President had not the power, for the salvation of the country, to suspend the writ of *habeas corpus,* I will not vote for it. . . I will not vote for any bill which indirectly assumes that he has not the power."[10] Bingham answered, at once: "The gentleman from Indiana may quiet his fears. . . The bill, neither directly nor indirectly, implies any such thing. As I said before, by the common judgment of everybody who has spoken on this question, the bill can do no harm if Congress has no power to meddle with the matter at all; if it has, it

[7] *Globe*, 2d S. 37th Cong. p. 3183.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.* p. 3184.

covers the Executive as with a shield. That is all there is of it. I call the previous question."[11] It is not necessary to push further, in this chapter, the question of interpretation in the House. Bingham, who was, if anyone was, in a position to know the mind of the Judiciary Committee, admitted that the bill neither directly nor indirectly implied that the President had not the power, for the salvation of the country, to suspend the writ of habeas corpus. A motion to lay the bill on the table was defeated, 89 to 29.[12] The bill was thereupon passed, without any record of the yeas and nays.[13]

The Senate received the bill from the House July 8, 1862, and referred it to the Judiciary Committee.[14] July 12 Trumbull, for the committee, reported it without amendment[15] and with a recommendation that it be passed.[16] The greater portion of the brief debate upon the bill—reported in what would amount to about five pages of the *Globe*—was devoted to the first two sections, and these provoked lively opposition, being construed by many to mean, as Wilson put it, "a jail delivery of traitors."[17] July 16 Wilson moved, in Committee of the Whole, to strike out these sections. The motion failed by the narrow vote of 18 to 19, and of the 19 only seven were Republicans.[18] The temper of the Republicans was clearly ominous.

The debate on the third section of the bill was brief but significant. Wilson interpreted the section as bestowing on the President congressional authority to suspend. "The third section of the bill, authorizing the President of the United States to suspend the writ of *habeas corpus*, I think very well, and am very willing to vote for it. . . "[19] Trumbull,[20] Sumner[21] and Foster[22] interpreted the section in the same

[11] *Globe*, 2d S. 37th Cong. p. 3189.
[12] *Ibid.* Colfax voted with the minority.
[13] *Ibid.* For text see below, pp. 268–270.
[14] *Ibid.* p. 3178.
[15] *Globe*, 2d S. 37th Cong. p. 3178.
[16] *Ibid.* p. 3360.
[17] *Ibid.* p. 3359.
[18] *Ibid.* p. 3384.
[19] *Ibid.* p. 3360.
[20] *Ibid.* p. 3385.
[21] *Ibid.*
[22] *Ibid.* p. 3361.

way. Henderson's adherence to this construction was less emphatic: "The third section of the bill, as I understand it, if there is anything in it, simply assumes the power in Congress to suspend the privilege of the writ of *habeas corpus*."[23] Howe took the other view. In speaking of the first section he said: "This proceeds on the assumption that the Government has exercised no power with which it is not clothed, that it has only exerted power with which it is clothed, and this is to clothe the judicial department of the Government with power which it does not now possess, to order the discharge of these persons. . . This bill, in the first section, assuming that the prisoner is rightfully confined, and therefore that he has no right to the writ of *habeas corpus*, provides that he may apply to the court for an order, and not for a writ. . . "[24] The peculiar language of the third section did not escape him. "In the very same bill," he said, "in which you are trying to discharge prisoners by an order, you declare that it is the right of the President already, and shall continue to be his right, to suspend the writ of *habeas corpus*. You do not propose to confer that power upon him, but to recognize it as his. . . Now what is the meaning of the whole bill? . . . Is not that the effect of the whole act [bill], acknowledging the right of the President to suspend the writ of *habeas corpus*, which is the time-long remedy for persons restrained of their freedom contrary to law, and creating a new remedy which will discharge the prisoner in spite of the suspension of the writ of *habeas corpus*. . . Now it does seem to me that either you ought to strike out the first two sections or the last."[25] Howe's argument is, as a whole, worthy of consideration.

Cowan proposed a number of amendments to the third section which have a direct bearing on the fundamental problem. These amendments, agreed to in Committee of the Whole, caused the section to assume this form: "That it is and shall be lawful for the President of the United States whenever,

[23] *Globe*, 2d S. 37th Cong. p. 3386.
[24] *Ibid.* pp. 3361–3362.
[25] *Ibid.* p. 3362.

(Congress not being in session,) in his judgment, by reason of 'rebellion or invasion the public safety may require it,' to suspend by proclamation the privileges of the writ of *habeas corpus* in all cases of political offences throughout the United States or in any part thereof, until the meeting of Congress thereafter; and whenever and wherever the said writ, &c."[26] Howe demanded the yeas and nays, in the Senate, on the amendment inserting the words "Congress not being in session," and in reiterating his interpretation of the section remarked: "The third section, as it stands in the bill, affirms what I believe to be the law of the land, that it is lawful for the President of the United States, whenever, in his judgment, by reason of rebellion or invasion, the public safety may require it, to suspend the writ of *habeas corpus*. The effect of these amendments, taken altogether, is to declare that that may be lawful for the President, in a certain contingency, that is to say in the absence of the Congress of the United States. . . "[27] The amendment was concurred in by a vote of 33 to 5.[28] This vote cannot, of course, be regarded as a definite expression of the sentiment of the Senate, for opponents of the bill might well, and doubtless did, vote for the amendment in order to expedite the destruction of the bill.

The Senate concurred in all Howe's amendments to the third section. Other amendments designed to perfect the bill or nullify it were offered, and debate was begun upon them when Chandler intervened with a very long speech on military mismanagement—a topic which he admitted was hardly relevant—for which he was afterwards rebuked on the ground that he divulged the proceedings of the Committee on the Conduct of the War.[29] It was the day before the end of the session. He talked until the evening recess came; he talked after the evening recess, and when he had at length concluded Wilson promptly moved that the Senate go into executive session.[30] The success of Wilson's motion would mean, of

[26] *Globe*, 2d S. 37th Cong. p. 3384.
[27] *Ibid.* p. 3385.
[28] *Ibid.*
[29] *Ibid.* pp. 3386-3392, 3401.
[30] *Ibid.* p. 3392.

course, the failure of the bill. Trumbull protested against the indirection of this method of getting rid of the bill—did not want it "to be overslaughtered in this way"—and demanded the yeas and nays on Wilson's motion. The result stood 25 for the executive session and 14 against it. The yeas were solidly Republican; the nays included five Republicans.[31] The bill was decisively disposed of for the session.

The thirty-seventh Congress, in its second session, made no positive advance toward a determination of the habeas corpus issue. The House, to be sure, committed itself upon the question. But the bill which embodied its decision, while logically an assertion of Congressional jurisdiction over the subject of suspension, was so phrased, in the vital third section, that it could be and was interpreted as leaving unassailed the President's right to suspend. The Senate's disapproval of the bill was obvious. Its vote of 33 to 5 in favor of inserting the words "Congress not being in session" if *bona fide* would go far to show that the Senate was a supporter of the President's initial claim. But its indirect though emphatic rejection of the bill leaves the question of its attitude on the issue still open. Once again Congress drew back from positive action on the habeas corpus question. The President's claim rightfully to suspend under certain circumstances went again unchallenged.

[31] *Globe*, 2d S. 37th Cong. p. 3393.

CHAPTER IV.

THE ACTION OF THE THIRD SESSION.

The long-continued inaction of Congress came to an end March 3, 1863, with the passage of the Habeas Corpus Act of that date. Weeks before this, however, several Republican senators expressed the opinion that it was now too late for an assertion of exclusive Congressional jurisdiction over the matter. Lane of Indiana said, December 22, 1862: "Gentlemen speak of the President's usurpation of authority. The Constitution authorizes the suspension of the privilege of the writ of *habeas corpus,* without saying in express terms who shall exercise that authority. The President has done it. It is an accomplished fact and cannot be undone. Suppose we now say that, in our opinion, the authority is given to Congress, can we change his convictions of duty or control his actions? Such a course will only bring about a conflict of authority between Congress and the President, and weaken the power of both."[1] A similar thought was developed by Collamer, January 9, 1863: "The Executive is just as much clothed with authority, and bound in duty when called on, to give construction to the Constitution in the execution of it as we are, and his decision is just as binding as ours . . . and it is not common courtesy for one department of this Government to say to another, 'We say the Constitution means so and so, and we are infallible.' The judiciary, when the question arises before them in the proper form, decide the Constitution in the particular suit, and that is all there is in their decision."[2] Collamer then drew the practical conclu-

[1] *Globe*, 3d S. 37th Cong. p. 158.
[2] *Ibid.* p. 247.

sion that Congress should treat the President's decision as settled by a body as competent as itself, and shape its legislation accordingly. It should not pass any bill in which the necessary implication was that the President's decision was incorrect. The President should not be asked to approve any such bill and thus "publish to the world that he has done that which he had no legal right to do."[3]

Cowan expressed the same idea with more emphatic brevity, January 27: "Now, whether this question of the *habeas corpus* has been decided right or wrong, it has gone by; let it go . . . it has been decided; the decision has been acted upon; and it is idle for us now to agitate ourselves and divide ourselves in its discussion when we can come to no conclusion, because we have no judicial power, we can make no decision that will be binding upon anybody."[4]

The Democrats in Congress were by no means convinced that the question was settled. They opened the session with a vigorous and systematic onslaught upon Presidential suspension in which the tonic effect of the late elections and other manifestations of public opinion is apparent.[5] Their attack was, however, unaccompanied by any plan for positive legislation.[6]

Republicans in House and Senate took up the question promptly and almost concurrently. December 8, 1862, Thaddeus Stevens, the aggressive and radical leader in the House, introduced a bill (House No. 591) "to indemnify the President and other persons for suspending the privilege of the writ of *habeas corpus,* and acts done in pursuance thereof; which was

[3] *Globe,* 3d S. 37th Cong. p. 247.

[4] *Ibid.* p. 542.

[5] See, *e. g.,* Powell's jubilant reference to the elections, *ibid.* p. 33.

[6] The character of the attack is indicated by the resolutions offered during the first few days of the session. In the House Cox offered a resolution condemning extraordinary arrests, December 1—the first day of the session. *Globe,* 3d S. 37th Cong. p. 2. The next day Powell introduced a resolution in the Senate which was substantially identical with Cox's. *Ibid.* p. 3. December 1 Richardson made a motion in the House to secure information from the President concerning Illinois arrests. *Ibid.* The next day Powell sought similar information in the Senate concerning Kentucky arrests. *Ibid.* pp. 3, 14. December 3 Senator Saulsbury introduced his much-debated resolution for information touching two Delaware arrests. *Ibid.* pp. 4, 5.

read a first time."[7] The bill in its curt directness is characteristic of its author.

"Whereas, since the 4th day of March, 1861, the United States have been in an insurrectionary and rebellious condition, and the public safety has required that the privilege of the writ of *habeas corpus* should be suspended; and whereas during that time the privilege of the said writ has been several times suspended by the President of the United States, and several arrests and imprisonments have taken place under and in consequence thereof; and whereas there is not entire unanimity of opinion as to which branch of the Government possesses the constitutional power to declare such suspension: Therefore,

"*Be it enacted, &c.*, That all such suspensions, arrests and imprisonments, by whomsoever made or caused to be made, under the authority of the said President, shall be confirmed and made valid; and the said President, Secretaries, heads of Departments, and all persons who have been concerned in making said arrests, or in doing or advising any such acts as aforesaid, are hereby indemnified and discharged in respect thereof, and all indictments, and information, action, suits, prosecutions, and proceedings whatsoever commenced, or to be commenced, against the said President, or any of the persons aforesaid in relation to the acts and matters aforesaid, or any of them, are hereby discharged and made void.

"SEC. 2. *And be it further enacted*, That during the existence of this rebellion the President shall be, and is hereby, invested with authority to declare the suspension of the privilege of the writ of habeas corpus, at such times, and in such places, and with regard to such persons, as in his judgment the public safety may require."[8]

The bill was obviously designed—it was in truth its main purpose—to void or prevent the bringing of civil or criminal suits against the President or any person acting under his authority for acts which would in the normal course of affairs be illegal. The danger was not altogether prospective.

[7] *Globe*, 3d S. 37th Cong. p. 20.
[8] *Ibid.* p. 529.

In the spring of 1862 Simon Cameron, late Secretary of War, had been arrested at the suit of Pierce Butler for "trespass *vi et armis*, assault and battery, and false imprisonment," and Secretary Welles had been exposed to similar reprisals.[9] It was even to be feared that Abraham Lincoln might suffer greater humiliation. Colfax said, December 8, 1862: "We have either to vindicate him [the President] as now proposed or leave him to be persecuted as soon as he retires from office by those whom he arrested."[10] Thaddeus Stevens went even further: "If there be a remedy for these false imprisonments it may extend to indictments as well as to civil suits, and how is the Government to indemnify the President for two years' imprisonment in the penitentiary?"[11]

The Stevens bill lacked the ambiguity which had characterized nearly all the preceding habeas corpus measures. It unequivocally granted the President authority to suspend: it did not declare that the President "is authorized to suspend," but enacted that he "shall be and is hereby" authorized to suspend. And yet, did the bill implicitly condemn the President's claim to suspend on his own authority? Thirty-seven minority members of the House in a formal protest asserted that the bill "purports to indemnify the President and all acting under his authority for acts admitted to be wrongful."[12] Several members of the Senate and other members of the House, Republican and Democratic, interpreted the bill in a similar way.[13]

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[9] *Globe*, 3d S. 37th Cong. pp. 165–166; 115 *War Records*, pp. 505–509; *Globe*, 2d S. 37th Cong. pp. 1763, 3245. Cowan intimated in 1866 that the Habeas Corpus Act was originally framed to protect an intimate friend of the President. *Globe*, 1st S. 39th Cong. p. 2021.

[10] *Globe*, 3d S. 37th Cong. p. 21.

[11] *Ibid.* p. 22. Cf. Horace Binney's opinion in his letter of May 17, 1862, to Francis Lieber: "But without the Habeas Corpus clause it [the power to indemnify] would not belong to the Federal government at all. With that clause, however, if Congress has the power of suspension, and not the President, why does not the *ratihabitio* cover the whole wrong, for the President's protection? It strikes me that this matter ought not to be neglected by the President's friends in the two houses, while they are the majority . . . I should be sorry to see the President come to grief between a bitter judiciary and a bitter jury." C. C. Binney's *Binney*, pp. 355–356.

[12] *Globe*, 3d S. 37th Cong. p. 165.

[13] In the Senate, Collamer (*ibid.* p. 248), Saulsbury (*ibid.* p. 543), and McDougall (*ibid.* p. 548). In the House, May (*ibid.* p. 1069), Walker (*ibid.* p. 1086), Yeaman (*ibid.*) and Stiles (*ibid.* p. 1087).

Olin's statement in the House is at least a tribute to the influence of Thaddeus Stevens: "In my judgment, sir—which may not be worth much—the bill is unnecessary. I hold that the President had the authority by law, and was the proper tribunal, to exercise all the powers that he has exercised in suspending the writ of *habeas corpus*; nevertheless I concur with my friend from Pennsylvania that a bill of this character is proper under the circumstances."[14]

Stevens's interpretation of his own measure must be given a great amount of weight: "I have not confessed the illegality of these acts, for this reason: the Attorney General of the United States and the Administration have held that the President had, without such a bill, full power; and if he had the power to order all these acts, then there is no remedy for anybody. A remedy exists only where there is a wrong. If the President had the right to suspend the writ of *habeas corpus,* and under that these results took place, I should like to know who had the right of action against him? There can be no such thing. If there be a remedy for these false imprisonments it may extend to indictments as well as to civil suits, and how is the Government to indemnify the President for two years' imprisonment in the penitentiary? What kind of indemnity is the Government to afford to men thus prosecuted under these laws? But, sir, if the President was right in supposing that he had the authority to suspend the privilege of the writ of *habeas corpus*, I admit with my friend from New York [Mr. Olin] that there would be no necessity for this bill. But then it would do no harm, it would confer no additional power, it would do only what could be done before. But I have recited that there is doubt on that subject. . . I do doubt the authority of the President of the United States to suspend the privilege of the writ of *habeas corpus* except when there is an absolute necessity for him to have that power, or an emergency when Congress is not in session."[15] The last is a significant concession from a great stickler for Congressional "sovereignty."[16]

[14] *Globe*, 3d S. 37th Cong. pp. 20–21.
[15] *Ibid.* p. 22.
[16] *Ibid.*

Stevens introduced his bill December 8. He proposed that it should be postponed for three days and that it should be made a special order and continue such until disposed of. He encountered, however, the exigent opposition of Vallandigham, and thereupon peremptorily withdrew his motion to postpone, asked that the bill be put upon its passage, and moved the previous question. A brief but warm wrangle over procedure ensued, but Stevens's domination of the majority was so firm that the bill, although still unprinted, was rushed through the various parliamentary stages and passed by a vote of 90 to 45. It was the most expeditious passage that a habeas corpus bill ever had during the civil war.[17] Two weeks later, when the Republicans had had an opportunity to reflect upon their precipitation, Pendleton submitted the protest of the thirty-seven minority members against the bill and the manner of its passage. On Stevens's motion the resolution of protest was laid upon the table, 75 to 41.[18]

The Senate received the bill December 9 and referred it to the Judiciary Committee, of which Trumbull was still chairman.[19]

Trumbull's enduring interest in a solution of the habeas corpus problem was exhibited later in the same day. The debates on Saulsbury's resolution concerning the Delaware arrests were beginning to unfold their length. Trumbull interrupted their progress for a moment to announce that he would move to lay the resolution upon the table and to take up House Bill No. 362—"a practical question."[20] December 10 the Senate, on his initiative, took up the bill and ordered it printed with a view to its further consideration.[21] Debate upon it began December 16.[22]

The ambiguity of the third section of House Bill No. 362 had been demonstrated to the Senate in the session of 1861–

[17] *Globe*, 3d S. 37th Cong. pp. 14, 20–22.
[18] *Ibid.* pp. 165–166.
[19] *Ibid.* pp. 25, 26.
[20] *Ibid.* p. 31.
[21] *Ibid.* p. 52.
[22] *Ibid.* p. 102.

1862.[23] No senator alluded to it in the session of 1862–63. Every one who discussed the bill took it for granted that the bill, with its "That it is and shall be lawful for the President . . to suspend . . . " meant Congressional authorization to suspend. Field's statement may be given as fairly typical. There were, he said, two objections to the third section: "The first is, it takes for granted that the power of suspending the privilege of the writ of *habeas corpus* is conferred by the Constitution upon Congress alone; and then it proposes that Congress should delegate to the President, not only the power of suspending the writ, but also of determining whether the exigency has arisen which would justify such a suspension . . . I hold that the Constitution of the United States confers upon the President, and not upon Congress, the power of suspending the privilege of the writ of *habeas corpus;* but if mistaken in this, I hold that Congress has no authority to delegate to the President the exercise of such a power."[24] Collamer went even further, and asserted that the bill was a condemnation of Presidential suspension: "It goes on the ground that anything he [the President] has done by way of imprisoning these people is not in the least altered by his suspension of the *habeas corpus*; that is to say, 'we are right about the construction of the suspension of the habeas corpus act [clause of the Constitution], and you are wrong.'"[25] It is at least curious that Howe did not remind the Senate of the other interpretation of the third section of the bill.

Collamer was dissatisfied with House Bill No. 362 because it seemed to him to reflect upon the President's claim to suspend. House Bill No. 591—Stevens's bill— was equally objectionable to him because it was, he feared, beyond the competence of Congress, which did not possess "the omnipotent powers of Parliament." If it was to be apprehended that the

[23] See chapter III, above.

[24] *Globe,* 3d S. 37th Cong., p. 216.

[25] *Ibid.* p. 247. See also statements of Senators Powell (*Globe,* 3d S. 37th Cong. p. 111), Lane of Indiana (*ibid.* p. 157), Wright (*ibid.* p. 200). Ten Eyck (*ibid.* p. 274), Trumbull (*ibid.* pp. 1090, 1092) and Doolittle (*ibid.* p. 1092). In the House, Wycliffe vigorously asserted, with animadversions, that the bill was declaratory. *Ibid.* p. 1105.

courts might consider the President's suspension an exercise of unfounded authority it would be, in his opinion, unwise to attempt to smother up the unconstitutionality by passing an act whose constitutionality would be questionable.[26] He did not confine himself to destructive criticism. His remarks were in fact prefaced by the introduction of a bill (Senate No. 457) embodying his views.[27] The bill was referred to the Committee on the Judiciary and on Sumner's motion was ordered to be printed.[28]

Collamer's words made such an impression upon the Judiciary Committee that it reported a bill, substantially the same as his,[29] January 15, 1863, as a substitute for Stevens's Bill No. 591, which had lain dormant in the pigeon-holes of the committee ever since its reference early in December.[30] The first section of the substitute provided for the transfer of suits begun in a State court for trespasses or wrongs done or committed under the authority or color of authority of the President to the United States Circuit Court. The second section provided that, even if judgment should be given against the defendant or respondent, yet, should it appear to the court that the defendant or respondent had reasonable or probable cause for doing what he did, or had acted in good faith, no execution should issue or further proceeding be had until after the adjournment of the then next ensuing session of Congress. The third section authorized the carrying of a case in which final judgment had been rendered by the Circuit Court to the Supreme Court, and the fourth fixed a period beyond which suits could not be brought.[31]

In recommending the measure which his committee had reported Trumbull took pains to point out that it did not reflect upon the legitimacy of Presidential suspension: "I will say . . . that this bill does not depend at all upon the power of the President to suspend the writ of *habeas corpus*. Whether he has the power or not, this bill would be necessary

[26] *Globe*, 3d S. 37th Cong. pp. 247–248.
[27] January 9, 1863. Substance of bill is given, *ibid.* pp. 248–249.
[28] *Ibid.* p. 249.
[29] *Ibid.* pp. 321, 535, 539, 541.
[30] *Ibid.* p. 321.
[31] Text, *ibid.* p. 529.

and it would be just as necessary if he had the power to suspend it as it would be if he had not; because the suspension of the writ of *habeas corpus* does not of itself justify the arrest of anybody. . . So, if the writ of *habeas corpus* was suspended by act of Congress with the concurrence of the President, both acting together, there would be the same necessity for this act to protect the officers, in case, acting from probable cause and in good faith, they had wrongfully made arrests."[32]

The discussion of the Judiciary Committee's substitute for Stevens's bill was animated, but it was begun and ended on the same day, January 27, 1863. The substitute underwent a variety of amendments, of which one offered by Cowan is noteworthy. It provided that the judge might interfere before judgment had been rendered, that is, that whenever in the course of the trial it was discovered that there was probable cause for making the arrest, the judge should charge the jury to that effect and tell it that that was a defence to the action and no judgment should ever be rendered.[33] Another and most important amendment was added at the instance of Sherman, to the effect that political prisoners arrested in peaceful States should have a hearing before the courts within thirty days, provided they were not persons subject to the articles of war.[34] The bill, as amended, was passed as a substitute for Stevens's bill by the handsome and almost suspicious majority of 33 to 7.[35] Its title was changed to the colorless "An

[32] *Globe*, 3d S. 37th Cong. p. 534. Trumbull's explanation does not seem conclusive. The Democrats, in this session, harped much upon the argument that suspension does not of itself authorize extraordinary arrest. Collamer, the father of the bill recommended by Trumbull, held the opposite view. In introducing Senate Bill No. 457, he said: "What did the Executive need to do for these periods of extremity? What was wanted? It was this: that he might, if the privilege of that writ was suspended, arrest people who had not committed crimes, and hold them to prevent their committing crimes that would put the nation in jeopardy. If he was only to arrest those people who had committed crimes, he could do that without having the writ of *habeas corpus* suspended at all." *Ibid.* p. 247. Cf. his statement on the substitute bill, *ibid.* p. 550.

[33] *Ibid.* p. 554. This amendment became section 2 of the substitute.

[34] *Ibid.*

[35] *Ibid.* Text of the bill is given below, pp. 271–274.

act to regulate judicial proceedings in certain cases therein mentioned."[36]

The emasculation of the title of the Senate's substitute, and the absence from it of anything corresponding to that clause of the Indemnity Bill which invested the President with authority to suspend, are not to be taken as evidence that the Senate was agreed that the question of the legitimacy of Presidential suspension was an idle one. That question was still to be dealt with by the Senate in the pending House Bill No. 362.[37] For the Senate's bill, just passed, was particularly concerned with those responsible for extraordinary arrests, while Bill No. 362 was devoted almost exclusively to the political prisoners themselves. The passage of the Senate's substitute for Stevens's bill did not interrupt proceedings upon the latter measure.

The debate upon House Bill No. 362, which had been taken up by the Senate December 10, 1862, did not become brisk until February. Up to that time it had been conducted in a leisurely fashion through set speeches made at irregular intervals, and presenting the customary arguments.[38] It was Trumbull—the man above all who is responsible for the Habeas Corpus Act of 1863—who gave life to the debate, February 19, by offering a substitute amendment to the bill. Trumbull's amendment was largely a recast of the bill, the third section alone undergoing grave alteration. The order of the sections was also changed, the third section of the House bill becoming the first section of the substitute.[39] Thus the first section of the substitute dealt with the suspension of the privilege of the writ, while the second and third

[36] *Globe*, 3d S. 37th Cong. p. 554. Vallandigham had tried on the day of the passage of Stevens's bill "to indemnify the president and other persons" by the House to have the title reflect more obviously upon the legitimacy of Presidential suspension by the addition of the words "and to empower the President to suspend the privilege of the writ of *habeas corpus* throughout the United States." He failed, of course. *Ibid.* pp. 20–21.

[37] It was really involved in Sherman's eleventh-hour amendment, but the point can best be considered in the last chapter of this essay.

[38] Field's elaboration of the argument that unless the President can suspend the virtue of suspension is lost, is very clever. *Ibid.* pp. 218–219.

[39] Text of the substitute amendment, *ibid.* pp. 1090–1091. For Trumbull's categorical statement of the changes he has made, see *ibid.* p. 1092.

sections provided for the liberation of political prisoners under conditions.

The first section of the substitute is the one with which this essay has particularly to do. It provided "That, during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend, by proclamation, the privilege[s] of the writ of *habeas corpus*, in all cases of political offences, throughout the United States, or any part thereof. . . "

There are important differences between this section and the third section of the House bill. Trumbull, in explaining the differences, summed them up thus: "The House bill limited the suspension until Congress should meet. The substitute I propose authorizes the suspension wherever the President, by proclamation, shall declare the writ suspended, so long as the proclamation continues in force and the rebellion exists."[40] Another important difference he did not allude to. It is fundamental.

What is the meaning of the words *"Be it enacted . . . That, during the present rebellion, the President . . . is authorized to suspend . . . ?"* The phrasing differs from the outspoken *"And be it further enacted,* That . . . the President shall be, and is hereby invested wth authority to declare the suspension . . . " of House Bill No. 591 and from the corresponding *"And be it further enacted,* That it is, and shall be lawful for the President . . . to suspend . . . " of House Bill No. 362. Trumbull, who wrote the clause, said that it meant Congressional authorization: "The substitute I propose authorizes the suspension . . . ;"[41] and that the section might be so interpreted everyone who expressed his views on the point agreed.[42] And yet, if Trumbull meant the bill to authorize suspension, why did he couch the clause in such unusual language—be it enacted that the President *is* authorized to suspend? Doolittle—not Trumbull—was the

[40] *Globe*, 3d S. 37th Cong. p. 1092.

[41] *Ibid.*

[42] See *ibid.* pp. 1093, 1094, 1158, 1183, 1187, 1204, 1205 for statements of Carlile, Bayard, Powell, Richardson, Howard, Saulsbury and Collamer, respectively.

first to draw attention to the significance of the phraseology: "Mr. President, the exposition given by my honorable friend from Illinois of this bill is very complete, although there is one suggestion that escaped him which I beg leave to occupy the attention of the Senate long enough to present. It is this: the first section of his substitute is so drawn that it does not assume of itself that the Congress of the United States clothes the Executive with power to suspend the writ. It does not assume to determine whether his authority to suspend the writ in cases of invasion or insurrection is derived from the act of Congress which we now pass, or is derived from the Constitution. . . . It does not assume to say that 'the President is hereby authorized to do it;' and therefore those persons who conscientiously maintain that under the Constitution the President is clothed with power without any legislation of Congress, can vote for this section upon the ground that this section is merely declaratory of a power which inheres in him under the Constitution itself; and those who maintain that it is to be derived from an act of Congress can sustain this section upon the ground that it is an enacting clause which gives him the power."[43] Trumbull himself conceded the "double" interpretation: "If ever there was an occasion to suspend the writ of *habeas corpus* in case of rebellion, surely that occasion exists now; and I am for giving that authority, for settling this mooted question, for it exists somewhere, either in the Executive or Congress, one or the other; and those of us who believe that Congress possesses the power can vote for the bill granting it; and those who believe the Executive has it, it seems to me, cannot object to the declaratory act at any rate.[44] Bayard spoke somewhat sharply of the "avowal of the design to pass a law for the purpose of leaving it so ambiguous that men of different minds may unite in its passage,"[45] but although the avowal was new, still the chief difference between this clause of the bill and the corresponding clauses of its predecessors was not the ambiguity, but the cleverness, the perfection, so to say, of the

[43] *Globe*, 3d S. 37th Cong. p. 1092. See also pp. 1093, 1194.
[44] *Ibid.* p. 1186.
[45] *Ibid.* p. 1094.

ambiguity. The designed and confessed ambiguity of the clause is indubitable, and it is impossible to maintain that those who voted for the bill thereby condemned Presidential suspension as illegitimate.[46]

Trumbull's conviction that the "mooted question" should be settled was shared by partisans of Presidential suspension. Howard, for example, who ultimately voted for the bill, said emphatically: "But, sir, if I vote for any measure purporting to give to the President of the United States a modified authority to suspend . . . I shall do so, as the lawyers say, *protestando*. I shall do it under a protest that the President of the United States, upon a fair construction of the Constitution, is already vested by the instrument with full authority to suspend. . . I am anxious to avoid, if we can avoid, the setting of a precedent which shall in the future look even to a divesting of the power of the Executive of this important authority. Still, I may, as I have observed, be induced to yield my opinions for the purpose of conciliation and harmony, and to vote for some measure that may be thought to quiet alarm, however unfounded the alarm may be."[47] Doolittle's amplification of this last thought is admirable: "Mr. President, my opinion is this: whether the power is derived from the Constitution or derived from the act of Congress to suspend the writ, it is the best policy to have it declared by Congress that the power exists either under the Constitution or under the act of Congress. . . We know very well that the people of the United States are so familiar with these terms, 'be it enacted,' which are used in the passage of laws by their representatives, whom they have chosen, who speak their own voice, who legislate for them, who declare the popular will, which, as our ancestors maintained, is to them the voice of God, that they submit to an enactment,

[46] This was asserted by Bayard and Saulsbury, for example. *Globe*, 3d S. 37th Cong. pp. 1094, 1204.

[47] *Ibid.* p. 1187. Cf. George Bancroft's interesting idea of the value of such a precedent, in his letter to Lincoln, February, 1863: "For one, though I think your position perfectly safe without it, I hope Congress will pass some bill, alike for your protection in the present case and for our security, should the nation ever suffer itself to elect a ticket like that of Breckinridge and Lane." Nicolay and Hay, vol. VIII, p. 36, footnote.

passed by their representatives, commencing 'be it enacted,' as the Israelites of old would submit to a 'thus saith the Lord.' But, sir, when a thing is assumed to be done by the order of any one individual, the Secretary of War or the President, their jealousy of despotic power exercised by an individual is such, that although he may be acting within his clear constitutional power, the people, perhaps, are less likely to acquiesce in an order of the War Department or an order of the President than they are to acquiesce in an enactment of Congress."[48]

The propositions embodied in the last two sections of Trumbull's substitute bill were not looked upon with unmixed favor by the majority of the Republicans. There was a feeling that political prisoners might secure their liberation too quickly for the good of the country.[49] February 23, when the passage of the bill seemed imminent, Collamer intervened and made a strong and determined attack upon the second and third sections: "The first section authorizes the President to suspend the *habeas corpus:* [A little later he employed this phraseology: "You authorize or declare, if you choose to use that word, that the President has the power to suspend the *habeas corpus*"]; which, I take it, if it means anything, means that he may hold persons in prison, in arrest, without being interfered with by any attempt of the courts to set them at liberty. . . After thus authorizing him to suspend the *habeas corpus*, the second section goes on to provide that the persons who are arrested and imprisoned shall be brought before the courts, and, if not indicted, discharged. The third section provides that they may be brought before a judge at any time after twenty days. . . This seems to imply that nobody is to be arrested unless they are persons guilty of some crime for which they can be indicted. . . It seems to me that the second and third sections are utterly inconsistent with the first. The first section authorizes the sus-

[48] *Globe*, 3d S. 37th Cong. p. 1092.

[49] This was expressed by Wilson, January 9, 1863, apropos of House Bill No. 362: "I do not know that I have any anxiety to try these prisoners . . and I want them tried in the manner in which the Government sees fit to do it." *Ibid.* p. 204.

pension of *habeas corpus*, so that the courts and judges cannot relieve the man; the second and third sections provide that they shall relieve the man."[50] The mantle worn by Howe on a similar occasion in the second session seems now to have rested on Collamer's shoulders.[51]

Trumbull used all his skill of argument and persuasion to meet this attack, pointed out that no one could be liberated except on conditions, and asked Collamer if he wanted the writ suspended forever.[52] Collamer pushed the attack home, and his motion to strike out the last two sections would have succeeded had not the Democrats and Unionists rallied to the assistance of Trumbull. The motion failed by the close vote of 18 to 20. Sixteen of the 18 were Republicans; the other two, Wall and Willey, subsequently voted against the bill. Only nine of the 20 were Republicans.[53]

The substitute bill, fortified by a number of minor amendments,[54] was finally passed, February 23, 1863, by a practically party vote of 24 to 13, Hicks, usually an Administration man, being the only non-Republican to vote for it and Lane of Indiana the only Republican to vote against it.[55] The title of the bill was amended to read, "An act to provide for suspending the privilege of the writ of *habeas corpus*, for the discharge of State prisoners and others, and to authorize taking bail in certain cases."[56] The bill—House Bill No. 362 as amended by the Senate—was returned to the House February 24.[57] It did not, however, become the subject of direct action in the House, but was considered only so far as it was em-

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[50] *Globe*, 3d S. 37th Cong. pp. 1205–1206.

[51] See above, p. 243.

[52] *Globe*, 3d S. 37th Cong. pp. 1206–1207.

[53] *Ibid.* p. 1207.

[54] The chief change in the first section was the elision of "by proclamation." See text of bill as passed, below, pp. 274–277.

[55] YEAS—Anthony, Chandler, Clark, Doolittle, Fessenden, Foot, Foster, Grimes, Harlan, Harris, Hicks, Howe, King, Lane of Kansas, Morrill, Pomeroy, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Wilmot, and Wilson of Massachusetts.

NAYS—Carlile, Henderson, Kennedy, Lane of Indiana, Latham, Powell, Rice, Richardson, Saulsbury, Turpie, Wall, Willey, and Wilson of Missouri. *Ibid.* p. 1208.

[56] *Ibid.* For text of bill see below, pp. 274–277.

[57] *Ibid.* p. 1249.

bodied in a Committee of Conference bill framed to reconcile the conflicting views of the two chambers upon House Bill No. 591.

The Senate's substitute for Stevens's House Bill No. 591 had been announced to the House January 28, 1863—the day after its passage by the Senate—and was taken from the Speaker's table February 12.[58] It received a brief and characteristic greeting from Stevens: "I hope that we shall non-concur and refer the matter to a committee of conference."[59] The measure was debated from time to time in a rambling discussion in which the Democrats did most of the talking and thrashed the old wheatless straw. Stevens closed the debate, February 19, by asking the House to non-concur. The House non-concurred, 114 to 35, and appointed its committee members.[60] They were Stevens, Bingham and Pendleton. The Senate members of the committee were Trumbull, Collamer and Willey.[61] All save Willey had been prominent in habeas corpus debates.

The report of the Committee of Conference was presented to the House February 27.[62] After considerable wrangling it was agreed that Saturday evening, February 28, should be given over to general debate and that the vote should be taken Monday, March 2.[63] The opportunity to make "campaign" speeches was so tempting that the evening of February 28 passed without any discussion of the bill. March 2, about one o'clock P. M., the report of the Committee of Conference was agreed to, 99 to 44.[64] The fight was obviously left for the Senate.

Immediately after the reading of the House message announcing the acceptance of the report of the committee Trumbull submitted the report to the Senate.[65] He explained, not without a trace of disingenuousness, the make-up of the

[58] *Globe*, 3d S. 37th Cong. pp. 572, 916.
[59] *Ibid.* p. 916.
[60] *Ibid.* p. 1107.
[61] *Ibid.* p. 1119.
[62] *Ibid.* p. 1354.
[63] *Ibid.* p. 1359.
[64] *Ibid.* p. 1479.
[65] *Ibid.* p. 1435.

Conference bill.[66] "I will state," he said, in his introductory remarks, "for the information of the Senate, that the report embraces nothing but the subject matter of the bill which passed the House of Representatives [Bill No. 591], and the amendments which passed the Senate."[67] A comparison of texts shows that the Conference measure was practically a fusion of the Senate's substitutes for House bills 362 and 591.[68] Sections one, two and three of the Conference bill—the Habeas Corpus Act of March 3, 1863—are almost an exact copy of the three sections of the former, and in the order named;[69] sections five, six and seven are identical with sections one, three and four of the latter. Section four of the Conference bill differs in phraseology from section two of the Senate's substitute for 591 but its practical effect is much the same.

The report of the Committee of Conference was received by the opposition senators with marked signs of disapproval. They resorted to confessed filibusterism to prevent its acceptance. By this means they delayed action until close to five o'clock A. M. of the last night of the session, and it was only by virtue of what under the circumstances may be called legitimate jockeying—to which the presiding officer, Senator Pomeroy, lent naïve aid—that the majority secured the concurrence of the Senate in the report.[70] The next morning the opposition senators protested against the tactics used against them and desired to have an opportunity to move to reconsider the vote. Doolittle suggested that the vote on the motion to send to the House for the report should be considered a test one, and therefore asked the yeas and nays.[71]

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[65] *Globe*, 3d S. 37th Cong. pp. 1436–1437.

[67] *Ibid.* p. 1436.

[68] See Appendices, below.

[69] The only change in the first section is the omission of a tautological "or."

[70] *Globe*, 3d S. 37th Cong. pp. 1460–1477. The tactics employed were clever. After considerable maneuvering around motions of various kinds, Fessenden called for the yeas and nays on a motion to adjourn. The vote was yeas 4, nays 33. Immediately the presiding officer said: "The question is on concurring in the report of the committee of conference. Those in favor of concurring in the report will say 'aye,' those opposed 'no.' The ayes have it. It is a vote. The report is concurred in." Then Trumbull: "I move that the Senate now proceed to the consideration of House bill No. 599."—Protests. *Ibid.* p. 1477.

[71] *Ibid.* pp. 1489–1494.

It would seem that the vote was so regarded. At any rate the alignment of the senators on the vote was what might have been predicted by one familiar with the previous votes on the habeas corpus question. The vote stood 13 to 25.[72] So the return of the report was not requested. The bill was signed by the President the same day, and bears the title "An Act relating to Habeas Corpus, and regulating Judicial Proceedings in certain cases."[73]

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[72] YEAS– Bayard, Carlile, Davis, Henderson, Latham, Nesmith, Powell, Rice, Richardson, Saulsbury, Turpie, Willey, and Wilson of Missouri.

NAYS– Anthony, Chandler, Clark, Dixon, Doolittle, Foster, Grimes, Harlan, Harris, Hicks, Howard, Howe, King, Lane of Indiana, Lane of Kansas, Morrill, Pomeroy, Sherman, Sumner, Ten Eyck, Trumbull, Wade, Wilkinson, Wilmot and Wilson of Massachusetts. *Globe*, 3d S. 37th Cong. p. 1494.

[73] *Ibid.* Appendix, p. 217. For text, see below, pp. 278–283.

CHAPTER V.

CONCLUSIONS.

It is now possible to draw some definite conclusions as to the nature of the precedent made by Congress in the years 1861–1863.

Congress did not, by passing the act of March 3, 1863, declare by implication or otherwise the illegality of Presidential suspension. The authors or sponsors of the bills which were ultimately merged into the act were careful to assert—and the bills themselves bear out the assertion—that the question of the rightfulness of the President's action was not at issue. The first section of the act, in phraseology which is almost unique, although it has been little remarked, enacts "That, during the present rebellion, the President . . . whenever, in *his* judgment, the public safety may require it, *is* authorized to suspend. . . And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled . . . to return the body of any person or persons detained by him *by authority of the President;* but upon the certificate, under oath, of the officer . . . that such person is detained by him as a prisoner *under authority of the President,* further proceedings . . . shall be suspended . . . so long as said *suspension by the President* shall remain in force, and said rebellion continue."[1] This phraseology is not accidental; it is the product of a prolonged process of refinement, commencing July 6, 1861, in which the dominating motive was unquestionably a desire not to deny the President's right to suspend. The long acquiescence of Congress in the President's suspension of the privilege of the writ coupled with its formal enactment in the

[1] Italics are not in the original. No reference was made, in any of the debates, to the possible significance of the words "during the present rebellion."

Habeas Corpus Act that the President *is* authorized to suspend were, in truth, recognition by Congress of the President's right to suspend.[2]

On the other hand, Congress, in passing the act, asserted its right to take control of the suspension of the privilege of the writ. If the first section was a recognition by Congress of the legality of Presidential suspension, the remainder of the act[3] was an assertion of the jurisdiction of Congress over the matter of habeas corpus suspension.[4] It is not possible to entertain the theory that Congress, by the act, "simply meant to declare what the measure of authority was in the President under the Constitution and independent of the act."[5] Doolittle told the naked truth when he admitted that, "taking the whole thing together," the act provided for "a modified suspension of the writ of *habeas corpus*."[6]

The action of Congress, the only possible competitor of the President, in recognizing his right to suspend, and in the same act assuming control of the suspension, perplexed some of the champions of the President's exclusive right to suspend. Horace Binney, the most redoubtable of these, said in a letter to a friend: "As to the Habeas Corpus, I will continue to think about it, as I have done. One of my difficulties is that Congress have bed——d the subject by their Act, having first, in new and unusual language for an Act of Congress, asserted or declared the President's right in the strongest and most ex-

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[2] Cf. Secretary Chase's statement of September 15, 1863: "You, Mr. President, have believed that you have the power to suspend the writ of *habeas corpus* without being authorized by Congress, and in some cases have acted on this belief. After much consideration I have come to the conclusion that your opinion and action are sanctioned by the constitution. Whatever doubt there may have been as to your power to suspend the writ, it has been removed by express legislation. The act of 3d March last, approved by you, authorizes you to suspend the writ in any case during the existing rebellion, when in your judgment the public safety may require it." Warden's *Chase*, p. 545.

[3] As already shown, the first section itself may be interpreted as authorizing suspension by the President. See above, p. 256. See also below, pp. 266–267, footnote.

[4] It should be clear to the reader that the evidence presented in this essay is not believed to affect the right, but only the exclusive right, of Congress to suspend. Cf. Dunning, *Essays on the Civil War and Reconstruction*, pp. 42–43.

[5] Conjectural interpretation of Howe, February 19, 1863. *Globe*, 3d S. 37th Cong., p. 1093.

[6] *Ibid.* p. 1207. Cf. *ex parte* Milligan, 4 *Wallace*, p. 4.

plicit terms, and then proceeded to regulate partially his proceedings, as if the power was their own. If I could make an argument to justify this, I should already have tried it."[7] In spite of this natural perplexity of a lawyer—a great lawyer—it must be said that the solution of the habeas corpus problem offered by the act of March 3, 1863, was practical and was well-fitted to the exigencies of rebellion or invasion and to the susceptibilities of a self-governing people. It was in accord with President Lincoln's initial opinion, wherein he had not claimed an exclusive right to suspend;[8] it satisfied the general plea of Henry Wilson, who had introduced the first habeas corpus measure. In his fiery speech of February 21, 1863, Wilson said: "My judgment tells me that the President of the United States has the power in time of insurrection or rebellion to suspend the writ of *habeas corpus*. The power by the Constitution is confided to the Government, to the President or Congress, or both. If there is no law upon the statute-book, and insurrection or revolution is sweeping over the land, and Congress is not in session, has not the President of the United States, in an hour like that, the power to suspend the writ of *habeas corpus*? If he has not that power, he ought to have it."[9] Finally it may be recalled, even at the risk of a *petitio principii*, that this solution satisfied a majority of each House of Congress and received the approval of the President, March 3, 1863.

The importance of the precedent made in 1861–1863 is obvious. It is, from the *de facto* standpoint, the strongest precedent there is. The privilege of the writ of habeas corpus had never been suspended, since the Constitution went into force, until 1861.[10] Constitutional theory and legal precedent

[7] C. C. Binney's *Binney*, pp. 388–389.

[8] "Now it is insisted that Congress, and not the executive, is vested with this power. But the Constitution is silent as to which or who is to exercise the power, and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion." See larger extract from the message, above, pp. 221–222.

[9] *Globe*, 3d S. 37th Cong. p. 1164.

[10] "The privilege of this great writ had never before been withheld from the citizen."—The Court, in *ex parte* Milligan, 4 *Wallace*, p. 115.

may find difficulty in fitting this historical precedent into pre-existing categories,[11] but theory and legal precedent, however stubborn and entrenched, must sooner or later yield to fact. Even the Supreme Court of the United States could not expect acquiescence in a decision against Congress and the President on the question of the right of the President to exercise a power so vital to the safety of the State as the power to suspend the privilege of the writ of habeas corpus. Taney's Circuit Court decision[12] was powerless against the Executive. The Supreme Court has not been placed in a position which has required it to pass upon the delicate question of the legality of suspension by the President.[13] But if the Court ever has to pass upon the question, it is reasonable to anticipate that it is likely to attach great weight to the historical precedent of 1861-1863.[14]

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[11] If it were the correct interpretation of the evidence submitted in the first four chapters of this essay that the President, in suspending, merely anticipates Congressional action, in default of which his suspension would be illegal, then the legal difficulties would vanish. In Brown *vs.* United States, 1814, Story said in his dissenting opinion: "I am perfectly satisfied that the position is well-founded, that no subject can legally commit hostilities, or capture property of an enemy, when, either expressly or constructively, the sovereign has prohibited it. But suppose he does, I would ask if the sovereign may not ratify his proceedings; and thus, by a retroactive operation give validity to them? Of this there seems to be no legal doubt." 8 *Cranch,* p. 133. In the Prize Cases, 1862, the court quoted this dictum with approval, although with little regard for the sacredness of quotation marks, but at the same time suggested that the legality of such retroactive legislation might be questionable in a criminal case. 2 *Black,* pp. 670, 671. Finally the Court, in 1883, in Mitchell *vs.* Clark, a case which involved the construction of the Habeas Corpus Act, swept aside the doubt expressed in 1862. Here the Court said: "That an act passed after the event, which in effect ratifies what has been done, and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it." 110 *U. S.* p. 640. If this doctrine were fully applicable to suspension of habeas corpus by the President then the American practice would be substantially the same as the British has been under Cabinet government, with the grave difference that the American Executive could not be certain of legislative indemnity, if Congress were hostile to him.

[12] *Ex parte* Merryman.

[13] In *ex parte* Milligan, the *cause célebre* of 1866, the question was raised and argued by counsel, but the Court refrained from expressing itself upon it, taking it as undisputed that the act of March 3, 1863, gave the President authority to suspend. 4 *Wallace,* pp. 2–142.

[14] It is not believed that the validity of these conclusions (chapter V) is affected by the very perfunctory obedience paid by the executive authorities to the requirements of the Habeas Corpus Act. The President acknowledged the

APPENDIX I.

HABEAS CORPUS BILLS PASSED BY EITHER HOUSE, 1861-1863.

BILL NO. 362, PASSED BY THE HOUSE, JULY 8, 1862.

An Act to provide for the discharge of State prisoners and others, and to authorize the judges of the United States courts to take bail or recognizance to secure the trial of the same.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State and the Secretary of War be, and they are hereby, directed forthwith or as soon as practicable to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of States in which the administration of

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obligation of the act by approving it, and his Secretary of War, Stanton, by order of March 23, 1863, directed Judge-Advocate-General Holt to see that the provisions of the act were observed. 121 *War Records,* p. 255. Holt construed the act most narrowly, and only once between March, 1863 and February, 1865—in the spring of 1863—did he furnish to the courts the lists required by the act. 118 *War Records,* pp. 765-766; 121 *War Records,* pp. 255-257. February 18, 1865, Stanton officially reported to the Senate that he had "no knowledge or information of any other persons held as state or political prisoners of the United States by order or authority of the President of the United States or of the Secretary of State, or of the Secretary of War, in any fort, arsenal, or other place, since the date of the report of the Judge-Advocate-General" [June 9, 1863]. This is an astounding statement. September 15, 1863, President Lincoln and the other departmental heads were, according to Secretary Chase, unfamiliar with the terms of the act. Warden's *Chase,* p. 546. The President's suspending proclamation of September 24, 1863, recites the act of March 3, 1863, but not in a way which proves that the President relied upon it as his authority to suspend. Lincoln's *Works,* vol. II, pp. 406-407. The same is true of the suspending proclamation of July 5, 1864. *Ibid,* pp. 541-543. Cf. Lincoln's letter to M. Birchard and others, June 26, 1863. *Ibid.* p. 361. Some political prisoners who sought release under the provisions of

the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be held, as prisoners of the United States in any fort, arsenal, or other place, as State or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all such who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest. And in all cases where a grand jury having attended said courts, or either of them having jurisdiction in the premises, since the arrest of said persons, has terminated its session without finding an indictment, or presentment, or other proceeding against such persons, and in cases hereinafter provided for, it shall be the duty of said judges forthwith to order the discharge of such prisoner from said imprisonment, and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order, and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than $500, and imprisonment in the common jail for a period not less than six months, in the discretion of the court.

SEC. 2. *And be it further enacted,* That in case any of such prisoners shall be under indictment or presentment for any off-

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the act were spirited away from the jurisdiction of the court. Appleton's *American Annual Cyclopædia,* 1864, pp. 450, 453; 1865, p. 414. In 1865, the President twice refused to obey the requirements of the second section of the act, and forbade the officers having the custody of the prisoners to surrender them to the court [Supreme Court of the District of Columbia]. The President endorsed on the writ of habeas corpus sued out by one of them: "The within named John Dugan was arrested on and is imprisoned by my authority. This writ of *habeas corpus* is suspended, and the officer having Dugan in custody is directed not to produce his body, but to hold him in custody until further order, giving this order on your return to the Court." The writ for the other, C. V. Hogan, was similarly endorsed. In both cases the court held that the President's constitutional authority to suspend was not restricted by the act—that the act was virtually null. 6 *D. C.* pp. 131–148; McPherson: *History of the Rebellion,* p. 562. No detailed investigation of executive violations of the act has been attempted, but the Congressional debates of 1864–1865 leave little doubt as to the conclusions which such an investigation would compel. They reveal sharp and sweeping condemnations of the executive authorities for their disregard of the act, made not only by political enemies of the Administration, but by such warm friends as Lyman Trumbull, Henry Winter Davis, Reverdy Johnson and J. A. Garfield. See *Globe,* 2d S. 38th Cong. pp. 63, 73 ff., 189, 255–257., 318–320, 784, 1323–1333 and 1372–1380.

ense against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judges at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and War shall for any reason refuse or omit to furnish the said list within five days from and after the passage of this act, any citizen may, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner or any other credible person, obtain and be entitled to have the said judge's order to discharge such prisoner: *Provided, however,* That the said judge shall be satisfied such allegations are true, and shall also, in all cases included in this bill, or if the public safety shall require it, have power and be required to take a recognizance or bail from such prisoner to keep the peace and be of good behavior toward the United States, and also to appear before the proper court, if he shall deem the same necessary after due examination of the case. And it shall be the duty of the district attorney of the United States to attend at such examination by said judge.

SEC. 3. *And be it further enacted,* That it is, and shall be lawful for the President of the United States, whenever, in his judgment by reason of "rebellion or invasion the public safety may require it," to suspend, by proclamation, the privilege of the writ of *habeas corpus* throughout the United States or in any part thereof, and whenever the said writ shall be suspended as aforesaid, it shall be unlawful for any of the judges of the several courts of the United States, or of any State, to allow said writ, anything in this or any other act to the contrary notwithstanding.[1]

BILL NO. 591, PASSED BY THE HOUSE, DECEMBER 8, 1862.

An Act to indemnify the President and other persons for suspending the privilege of the writ of Habeas Corpus, and acts done in pursuance thereof.

Text is given above, p. 248.

[1] *Globe,* 2d S. 37th Cong. pp. 3105–3106.

SENATE SUBSTITUTE FOR BILL NO. 591, PASSED BY THE SENATE, JANUARY 27, 1863.

An Act to regulate Judicial Proceedings in certain cases therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or military, or against any other person, for any arrest or imprisonment made or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition stating the facts and verified by affidavit for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the State court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged. And such copies being filed as aforesaid in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so at-

tached to answer the final judgment in the same manner as by the laws of such State they would have been holden to answer final judgment had it been rendered in the court in which the suit or prosecution was commenced. And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any State court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or term of said court at which the same shall have taken place, from such court to the next circuit court of the United States, to be held in the district in which such appeal shall be taken, in manner aforesaid. And it shall be the duty of the person taking such appeal to produce and file in the said circuit court attested copies of the process, proceedings, and judgment in such cause; and it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and the said circuit court shall thereupon proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding. And any bail which may have been taken, or property attached, shall be holden on the final judgment of the said circuit court in such action, in the same manner as if no such removal and transfer had been made, as aforesaid. And the State court from which any such action, civil or criminal, may be removed and transferred as aforesaid, upon the parties giving good and sufficient security for the prosecution thereof, shall allow the same to be removed and transferred, and proceed no further in the case: *Provided, however,* That if the party aforesaid shall fail duly to enter the removal and transfer, as aforesaid, in the circuit court of the United States, agreeably to this act, the State court by which judgment shall have been rendered, and from which the transfer and removal shall have been made, as aforesaid, shall be authorized, on motion for that purpose, to issue execution, and to carry into effect any such judgment, the same as if no such removal and transfer had been made:

And provided, also, That no such appeal or writ of error shall be allowed in any criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the State court. And in any action or prosecution against any person, as aforesaid, it shall be lawful for such person to plead the general issue, and give this act and any special matter in evidence. And if in any suit hereafter commenced the plaintiff is nonsuited or judgment pass against him, the defendant shall recover double costs.

SEC. 2. *And be it further enacted,* That if it shall appear upon the trial of any action provided for and mentioned in the first section of this act that there was probable cause for the arrest, imprisonment, or other act complained of, or that in making such arrest or imprisonment, or committing such act, the defendant acted in good faith, under the authority or order of the President of the United States, or under an act of Congress, then, and in every such case, the foregoing facts, or either of them, shall constitute a full and complete defence to the action; and it shall be the duty of the court trying the cause so to instruct the jury, and that their finding must be accordingly.

SEC. 3. *And be it further enacted,* That any suit or prosecution described in the first section of this act, in which final judgment may be rendered in the circuit court, may be carried by writ of error to the Supreme Court, whatever may be the amount of said judgment.

SEC. 4. *And be it further enacted,* That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed: *Provided,* That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of

this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act.

SEC. 5. *And be it further enacted*, That any person not in the military or naval service, and not subject to the rules and articles of war, who shall be arrested in any State or district wherein the ordinary process of the courts of the United States is not obstructed, for aiding the present rebellion, or for obstructing the execution of any law or military order, shall be discharged from such arrest, unless, within thirty days after such arrest, the charges against such person shall be reduced to writing and filed in the office of the clerk of the district court of the United States in the district in which such person is arrested. And it shall be the duty of the judge of said court, upon the application of such person, to examine into the cause of such arrest; and, upon hearing of such application, such judge may discharge such person, hold him to bail, or dismiss his application, as, in the opinion of such judge, the public safety may require.[1]

SENATE SUBSTITUTE FOR BILL NO. 362, PASSED BY THE SENATE, FEBRUARY 23, 1863.

An Act to provide for suspending the privilege of the writ of Habeas Corpus, for the discharge of State prisoners and others, and to authorize taking bail in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, during the present rebellion, the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case, or throughout the United States or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained, that

[1] *Globe*, 3d S. 37th Cong. pp. 554, 1056–1057.

such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ so long as said suspension by the President shall remain in force and said rebellion continue.

SEC. 2. *And be it further enacted,* That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of States in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said Secretaries, in any fort, arsenal, or other place, as State or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all such who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest—the Secretary of State to furnish a list of such persons as are imprisoned by the order or authority of the President, acting through the State Department, and the Secretary of War a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment, or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than $500, and imprisonment in the common

jail for a period not less than six months, in the discretion of the court: *Provided, however,* That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he [or she] will not hereafter in any way encourage or give aid and comfort to the present rebellion or supporters thereof: *And provided, also,* That the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required, to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend said examination before the judge.

SEC. 3. *And be it further enacted,* That in case any of such prisoners shall be under indictment or presentment for any offense against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judge at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and War shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid at the time of the passage of this act within twenty days hereafter, and of such persons as thereafter may be arrested within twenty days from the time of the arrest, any citizen may, after a grand jury shall have terminated its session without having found an indictment or presentment, as provided in the second section, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner or any other credible person, obtain and be entitled to have the said judge's order to discharge

such prisoner on the same terms and conditions prescribed in the second section of this act: *Provided, however,* That the said judge shall be satisfied such allegations are true: *Provided,* That this act shall continue and be in force until the 1st of March, 1864, and no longer.[1]

[1] *Globe,* 3d S. 37th Cong. pp. 1205–1208.

APPENDIX II.

THE HABEAS CORPUS ACT OF MARCH 3, 1863.

An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue.

SEC. 2. *And be it further enacted,* That the Secretary of State and the Secretary of War be, and they are hereby, directed, as soon as may be practicable, to furnish to the judges of the circuit and district courts of the United States and of the District of Columbia a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United

States or either of said Secretaries, in any fort, arsenal, or other place, as state or political prisoners, or otherwise than as prisoners of war; the said list to contain the names of all those who reside in the respective jurisdictions of said judges, or who may be deemed by the said Secretaries, or either of them, to have violated any law of the United States in any of said jurisdictions, and also the date of each arrest; the Secretary of State to furnish a list of such persons as are imprisoned by the order or authority of the President, acting through the State Department, and the Secretary of War a list of such as are imprisoned by the order or authority of the President, acting through the Department of War. And in all cases where a grand jury, having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person, it shall be the duty of the judge of said court forthwith to make an order that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged; and every officer of the United States having custody of such prisoner is hereby directed immediately to obey and execute said judge's order; and in case he shall delay or refuse so to do, he shall be subject to indictment for a misdemeanor, and be punished by a fine of not less than five hundred dollars and imprisonment in the common jail for a period not less than six months, in the discretion of the court: *Provided, however,* That no person shall be discharged by virtue of the provisions of this act until after he or she shall have taken an oath of allegiance to the Government of the United States, and to support the Constitution thereof; and that he or she will not hereafter in any way encourage or give aid and comfort to the present rebellion, or the supporters thereof: *And provided, also,* That the judge or court before whom such person may be brought, before discharging him or her from imprisonment, shall have power, on examination of the case, and, if the public safety shall require it, shall be required to cause him or her to enter into recognizance, with or without surety, in a sum to be fixed by said judge or court, to keep the peace and

be of good behavior towards the United States and its citizens, and from time to time, and at such times as such judge or court may direct, appear before said judge or court to be further dealt with, according to law, as the circumstances may require. And it shall be the duty of the district attorney of the United States to attend such examination before the judge.

SEC. 3. *And be it further enacted*, That in case any of such prisoners shall be under indictment or presentment for any offence against the laws of the United States, and by existing laws bail or a recognizance may be taken for the appearance for trial of such person, it shall be the duty of said judge at once to discharge such person upon bail or recognizance for trial as aforesaid. And in case the said Secretaries of State and War shall for any reason refuse or omit to furnish the said list of persons held as prisoners as aforesaid at the time of the passage of this act within twenty days thereafter, and of such persons as hereafter may be arrested within twenty days from the time of the arrest, any citizen may, after a grand jury shall have terminated its session without finding an indictment or presentment, as provided in the second section of this act, by a petition alleging the facts aforesaid touching any of the persons so as aforesaid imprisoned, supported by the oath of such petitioner or any other credible person, obtain and be entitled to have the said judge's order to discharge such prisoner on the same terms and conditions prescribed in the second section of this act: *Provided, however*, That the judge shall be satisfied such allegations are true.

SEC. 4. *And be it further enacted*, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue.

SEC. 5. *And be it further enacted*, That if any suit or prosecution, civil or criminal, has been or shall be commenced in

any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such court and entering special bail in the cause, if special bail was originally required therein. It shall then be the duty of the state court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged. And such copies being filed as aforesaid in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding. And any attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered in the court in which the suit or prosecution was commenced. And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any state court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or term of said court at which the same shall have taken place, from such court to the next circuit

court of the United States to be held in the district in which such appeal shall be taken, in manner aforesaid. And it shall be the duty of the person taking such appeal to produce and file in the said circuit court attested copies of the process, proceedings, and judgment in such cause; and it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and the said circuit court shall thereupon proceed to try and determine the facts and the law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding. And any bail which may have been taken, or property attached, shall be holden on the final judgment of the said circuit court in such action, in the same manner as if no such removal and transfer had been made, as aforesaid. And the state court, from which any such action, civil or criminal, may be removed and transferred as aforesaid, upon the parties giving good and sufficient security for the prosecution thereof, shall allow the same to be removed and transferred, and proceed no further in the case: *Provided, however,* That if the party aforesaid shall fail duly to enter the removal and transfer, as aforesaid, in the circuit court of the United States, agreeably to this act, the state court, by which judgment shall have been rendered, and from which the transfer and removal shall have been made, as aforesaid, shall be authorized, on motion for that purpose, to issue execution, and to carry into effect any such judgment, the same as if no such removal and transfer had been made. *And provided also,* That no such appeal or writ of error shall be allowed in any criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the state court. And if in any suit hereafter commenced the plaintiff is nonsuited or judgment pass against him, the defendant shall recover double costs.

SEC. 6. *And be it further enacted,* That any suit or prosecution described in this act, in which final judgment may be rendered in the circuit court, may be carried by writ of error

to the Supreme Court, whatever may be the amount of said judgment.

SEC. 7. *And be it further enacted,* That no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed or act may have been omitted to be done: *Provided,* That in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act.[1]

[1] *Public Laws of the United States of America,* 3d S. 37th Cong. pp. 755-758.

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